Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11621/2019

THE IMMIGRATION ACTS

Heard at Manchester (via Skype)
On 13 May 2021

Decision & Reasons Promulgated
On 1 June 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KHIM BAHADUR RANA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R K Rai instructed by Sam Solicitors.
For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Sullivan ('the Judge') who, in a decision promulgated on 20 December 2020, dismissed the appellant's appeal against the refusal of an application for entry clearance as the son of a former member of the Gurkha Regiment, the appellants father and his sponsor, on human rights grounds.

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2. The appellant applied for leave to enter in April 2016, which was refused by an Entry Clearance Officer on 11 May 2016 and an appeal against that decision dismissed on 18 September 2017. The Judge notes the current appeal stems from a similar application made on 12 March 2019.

Background

3. The appellant is a citizen of Nepal who was born on 27 April 1985. The Judge sets out an assessment of the evidence and the findings from [15] of the decision under challenge.
4. The Judge finds there was no evidence the appellant was unable to care for himself on a daily basis or that he requires long term personal care, leading to it being found he does not qualify for entry clearance under paragraph EC-DR of the Immigration Rules.
5. It was also found that as at the date of the current application the appellant was 33 years of age he did not satisfy the criteria at Appendix K of the Rules. Appendix K was introduced to enable qualifying adult children of former Gurkha soldiers denied the right to enter the United Kingdom with their fathers as a result of the 'historic injustice' to have their cases considered in line with the case law that developed in relation to this area.
6. In relation to the ability of the appellant to succeed outside the Rules the Judge's core findings are set out at [21 –31] in the following terms:

> "21. I find that there is a lack of clarity in the sponsors evidence about the whereabouts of the Appellant's siblings. In oral evidence I heard that the Appellant had been living with his brothers in the family home until 2015. The sponsors evidence was that the Appellant's siblings had then gone somewhere else; in evidence in chief he said that after the earthquake destroyed the family home the Appellant's brothers had gone elsewhere and the Appellant had gone to Butwal. I find that this differs from earlier written evidence. According to the sponsors first witness statement his son Dhanendra Rana was then living in Butwal with his wife and children as were the family of his son Toman Singh Rana who was then working in Qatar. In his second witness statement the sponsor wrote that in 2015 the Appellant had decided to move out of the family home he had been sharing with his siblings *"as all of his siblings married"*. He said nothing there to update the information about the whereabouts of the Appellant's siblings. In oral evidence the sponsor said that his son Dhanendra and his family and the family of his son Toman had now gone to other places; he did not say when or why they left Butwal or, where they have gone. He did confirm, contrary to his evidence in chief, that initially they had gone to Butwal from Birbas. I find that the Appellant has had his family living close to him in Butwal from 2015 until very recently and that the sponsor has in parts of his evidence sought to minimise evidence of family proximity to the Appellant.
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> 22. The sponsor has provided phone screenshots and calls lists which he says show his contact with the Appellant. I accept that these are illustrative and were not intended to show every call made. It was clear

to me from watching the sponsor give oral evidence that when talking about video calls with the Appellant he was visualising how those calls were made. I accept that he has been in contact with the Appellant by Internet enabled voice and video calls. The sponsor says that those calls can take place up to 5 times a week. It is apparent from some of the telephone screenshots showing multiple dates that there are weeks in which contact between the sponsor and the Appellant was not that frequent (e.g. AB, p.A141, A167-168). While acknowledging that other pages in the AB show more contact, between 30 September 2018 and 16 October 2018 the calls between them lasted only 1 minute 18 seconds in total (AB, p.161). It is also clear that not every entry on the phone lists/screenshots is evidence of effective communication, there being several which are annotated as "cancelled", "missed call" or show a call of zero duration (e.g. AB, pp.A153, A155, A141). Considering the evidence as a whole I am not satisfied that the sponsor and Appellant speak with one another as frequently as the sponsor claimed. The Refusal identifies the paucity of visits by the sponsor and his wife to Nepal after 2005.

23. Neither of the sponsors witness statements provides insight into what he and the Appellant talk about. On enquiry, it became apparent that the sponsor does not know, for example, about any personal relationship the Appellant might have and had not discussed with the Appellant whether or not he should undertake further education/training to assist him in finding work.

24. I asked the sponsor when the Appellant had last asked for his advice; he replied that he had gone to Nepal last year. I find that this evidence shows that between 17 December 2019 and 11 November 2020 the Appellant did not seek any advice from the sponsor; this is not indicative of a relationship of dependence between them. I asked if the Appellant had considered further training or education and the sponsor said that he had not asked the question, but that it would require money. I am not satisfied that the Appellant turns to the sponsor for advice about personal matters, personal development, or about future plans (other than coming to the United Kingdom).

25. The sponsor also appears to be unaware of other aspects of the Appellant's life. The Respondent's representative asked whether the Appellant has a driving licence. The sponsor said that he (the sponsor) had seen the Appellant riding a borrowed motorcycle but that he did not have a driving licence. I contrast that with the money transfer documents (e.g. AB, p.A122) which appear to show that the Appellant repeatedly relied on his driving licence to collect money in Butwal.

26. Asked about what the Appellant does each day all the sponsor could say was that the Appellant was mainly on the phone and probably crying. Asked what the Appellant does when he is not on the phone the sponsor replied that he does not know. I am not satisfied that the sponsor knows much about the Appellant's daily life or current interests/activity.

27. There is no witness statement from the Appellant. He has not said what expenses he encounters from day to day. The only document providing

any such detail is the 2016 tenancy agreement (AB, pp.A76-A77) which shows monthly rent of Rs. 8,000 to have been payable in May 2016, to increase by 10% every 2 years, and confirms that responsibility for paying electricity, water and communication charges rested with the Appellant.

28. The sponsor claims that he sends money to Nepal to meet all of the Appellant's housing, food, medical and other expenses. Numerous money transfer documents have been provided; again I accept that these are intended to be illustrative and are not intended to represent the entirety of the money transfers. I have reviewed the evidence of money transfers whether evidenced by bank statement entries or money transfer receipts; there is duplication in the evidence (e.g. AB, pp.A107 & A111, A109 & 130, A108 & 131, A110 & 134, A111 & 133). Discounting those duplications and taking an average over the five years (February 2015 - January 2020) covered by the documents I find that the sponsor has been sending the Appellant more than sufficient to cover the rent payable on the Butwal property, with a surplus which could be used to meet other expenses.

29. Police and other Nepalese authorities have provided letters/certificates confirming the Appellant's place of residence, marital status, family composition and employment status. None of the authors of these letters appears to be aware that the Appellant has been living in Butwal since 2015 and this brings the reliability of their information into question. Furthermore, the various certificates are dated in 2016 and February 2019; the most recent is 1 year and 9 months out of date. I am not satisfied that they provide current or reliable evidence that the Appellant is unmarried or unemployed.

30. I am not satisfied that I have been told the truth about the Appellant's work experience in Nepal. When explaining how the Appellant would manage in the United Kingdom. The sponsor ventured that he (the Appellant) would be able to work in a hotel washing dishes or serving food and that the Appellant had done so in the past. It appears to me that the sponsor then tried to resile from that evidence saying at one stage that the Appellant had never done any work in Nepal, that he had been referring to the Appellant washing dishes and serving meals in the family home and then that he (the sponsor) did not know whether or not the Appellant had work experience in Nepal. I am not satisfied that the Appellant has been unemployed since leaving education in Nepal. In consequence of this, and the absence of evidence from the Appellant as to his expenses and resources I am not satisfied that the Appellant relies on money sent by the sponsor in order to meet his essential needs. In other words, I am not satisfied that the Appellant is financially dependent on the sponsor notwithstanding the sums transferred by the latter.

31. I am not satisfied that the Appellant is financially or emotionally dependent on the sponsor (or vice versa). In consequence, I am not satisfied that they now share family life. For the purposes of Article 8 of the 1951 Convention."

7. The appellant applied for permission to appeal, which was refused by another judge of the First-tier Tribunal on the basis the grounds were no more than disagreement with the findings that the Judge was entitled to make regarding the family relationship.
8. The application was renewed to the Upper Tribunal where it was granted; the operative part of the grant being in the following terms:

> "3. The grounds argue that the judge erred in his assessment of the evidence and, in effect, overstated the requirements to establish 'family life' in Gurkha case following Rai v ECO [2017] EWCA Civ 320, especially at [17] and [38].
>
> 4. Whilst the judge may have made sustainable findings (at [30]) in relation to an absence of financial dependency, it is arguable that the judge has not, despite his citation of Rai at [9], sufficiently grasped and applied what the Court said at [17] that family life may well be constituted, even though the relationship "falls well short" of dependency, in particular in the light of the evidence concerning emotional dependency. For these reasons, permission to appeal is granted."

Error of law

9. The Judge is criticised for focusing too much on the evidence of dependency and in failing to find whether the support the sponsor provides to the appellant was real, committed or effective, and in failing to take into account relevant facts when assessing the key questions in the appeal. It is also argued that the Judge ignored practical and financial realities entailed in the decision to leave Nepal by the sponsor to pursue a legitimate legal right as a former member of the Gurkha Regiment.
10. In Rai at [17] and [38] the Court of Appeal found:

> "17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ.

agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

…

38. Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach."

11. There was no challenge to the evidence in Rai, the issue in that case being whether article 8 ECHR was engaged on the facts. At [30] of the decision the Court also record:

"30. The first difficulty I have in accepting Ms Patry's argument here is that the Upper Tribunal judge did not actually express a distinct and definite conclusion on the question of whether or not the appellant did in fact enjoy family life with his parents, within the meaning of article 8(1). There is, it seems to me, no clearly stated resolution of that issue in the determination."

12. In this appeal the Judge makes a clear finding at [31] that family life recognised by article 8 ECHR was not engaged on the evidence. Whether article 8 is engaged is a question of fact. The Judge arrived at this finding having considered the evidence holistically and with knowledge of the relevant case law.

13. Mr McVeety referred in his submissions to Rai at [41] where it is written:

"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 – 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."

14. It was submitted that the key finding of the Judge failed to go beyond consideration of the normal relationships between adult siblings and their parents and that the extent and degree of emotional contact showed the closeness of the bond, but the finding that no such additional element existed is supported by the Judge's reasons, especially those relating to the lack of knowledge that the sponsor had concerning his son in Nepal.

15. The conclusion of the Judge that it had not been shown that the appellant remained part of the sponsor's family unit and by implication that he would have remained the same but for the historic injustice argument, is an important finding.
16. The Judge was clearly aware of the relevant case law as noted from [9] in which the Judge writes:

> "9. The requirements of the Rules relevant to this appeal are at section EC-DR of Appendix FM. A case involving issues of family or private life must be assessed in accordance with sections 117 A, B and D of the 2002 Act. Guidance on the application of Article 8 in cases involving the adult sons/daughters of former Gurkha servicemen is given in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320. I should consider whether there is a sufficient degree of financial or emotional dependence between adults and whether family life has endured beyond the sponsor's departure from Nepal. Guring & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWCA Civ 8, emphasised the significance of the historic injustice recognised in the past treatment of Gurkha servicemen and their families, particularly when any Article 8 proportionality assessment is made."

17. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) it was held that (i) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments; (ii) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware); (iii) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight; (iv) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the SSHD/ECO consist solely of the public interest in maintaining a firm immigration policy; (v) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (a) their family life engages Article 8(1); and (b) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour

may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance.

18. In this appeal the core question is whether the Judge has made findings not reasonably open to him on the evidence in concluding that it had not been made out that family life recognised by article 8 exists. The Judge was not helped by it becoming clear that he has not been told the truth about the appellant's work experience and the appellant's case was not helped by the evidence given showing a lack of knowledge or understanding by the sponsor of the appellant's life and circumstances within Nepal. I do not find it made out that the Judge's conclusion that the appellant is not an integral member of the sponsor's family unit, when taking all the history of this case into account, is a finding outside the range of those reasonably available to the Judge on the evidence. It is neither perverse, irrational, or contrary to the evidence.
19. I therefore find that in finding that family life recognised by article 8 ECHR was not shown to exist the Judge has not materially erred in law. As such family life does not exist the Judge was not required to consider the proportionality of the decision pursuant to article 8(2) where the historic injustice argument may have become relevant.

Decision

20. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

21. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated 18 May 2021