



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005177

First-tier Tribunal No: HU-53820-2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 June 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR GOPAL LIMBU CHEMJONG
(NO ANONYMITY ORDER MADE)

Appellant

and

The Entry Clearance Officer

Respondent

Representation:

For the Appellant: Ms K McCarthy, counsel instructed by Gurkha Solicitors Limited
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 30 May 2023

DECISION AND REASONS

Introduction

1. This is the remaking of an appeal against the decision of the Entry Clearance Officer refusing the appellant's human rights application.

Anonymity

2. No anonymity direction was made previously, and there is no reason for one now.

Background

3. On 28 January 2021, the appellant, who was born in 1982, applied for entry clearance to the United Kingdom as the adult dependent child of his father who is a former member of the Brigade of Gurkhas. The sponsor settled in the United Kingdom in 2010. By way of background, the appellant made an earlier

application on the same basis which was refused on 2 March 2018, and which was dismissed following an appeal (HU/08575/2018).

4. The instant application was refused by way of a decision dated 25 May 2021 and this is the decision which is the subject of this appeal. The reasons for the respondent's decision can be summarised as follows.

Whilst I acknowledge that you have submitted evidence of your relationship to your sponsor, and that you may receive some financial support from your sponsor and that you remain in contact with him, you have not demonstrated that you are financially and emotionally dependent upon your father beyond that normally expected between a parent and adult child.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, the judge took the decision of the judge who previously heard the case as the starting point, applying *Devaseelan* [2002] UKIAT 00702. Medical evidence was relied upon to support the appellant's claim to be emotionally traumatised owing to separation from his parents, to be suffering from PTSD and Generalised Anxiety Disorder. The judge found there to be significant discrepancies between the facts presented at the appeal in 2018 and those raised before her and concluded that there had been some embellishment. The decision of the First-tier Tribunal was set aside, with no findings preserved, following an error of law hearing which took place on 16 February 2023. The reasons are set out in that decision, but it suffices to say that the respondent conceded that the judge made inconsistent findings as to the existence of family life between the appellant and the sponsor.

The continuance hearing

6. The sponsor, Mr Limbu, travelled from Nottingham to give evidence on the appellant's behalf. Regrettably, a Nepali-speaking interpreter had not been booked. Ms Gilmour indicated that she had wanted to ask the sponsor a few questions, albeit she was not questioning the credibility of his evidence. After taking some time to consider matters, Ms Gilmour elected to take a pragmatic approach, having first sought approval from the Secretary of State. Ms Gilmour conceded that Article 8(1) was engaged and owing to the effect of the historic injustice, this was determinative of the appeal, in the appellant's favour. Owing to the that concession, I had no need to hear from Ms McCarthy. I indicated to the representatives that the appellant's appeal against the decision of the respondent was allowed.

The decision on remaking

7. In remaking this appeal, I have taken into consideration all the evidence before me, including that contained in the appellant's bundle of evidence which was before the First-tier Tribunal, the sponsor's supplementary statement dated 29 May 2023 as well as the concession made on behalf of the respondent.
8. It is common ground that the appellant did not meet the requirements of the Immigration Rules at the date of decision and did not fall within applicable policy on adult dependants of ex-Ghurkha soldiers found in Annex K.
9. Ms Gilmour did challenge any aspect of the evidence during the remaking of this appeal. Briefly, the sponsor's evidence is that the appellant stopped his

studies in Nepal, when the sponsor suffered a stroke in 2003, to care for him, doing so until the sponsor came to the United Kingdom in 2010. Owing to his separation from his parents as well as the refusals of his application for entry clearance, the appellant, who is the youngest son, suffers from poor mental health which has not improved despite the treatment which is detailed in his medical documents. The sponsor supports the appellant financially and he is also accommodated free of charge in the sponsor's home which the appellant now occupies alone. The sponsor also provides emotional support to the appellant, who is unemployed and single. Reliable supporting documentary evidence was provided in the form of money transfer receipts, pension documents, bank statements, travel details, passport copies, photographs, medical and telephone records. The sponsor has not been able to travel to Nepal of late owing to his own poor health and frailty.

10. I have considered what was said in *Gurung* [2013] EWCA Civ 8, at [45]: *"Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case."*
11. The relevant question was whether there existed a degree of dependency over and above that which would be expected in a normal family. Ms Gilmour rightly accepted that there was. I also accept that the appellant is and was wholly financially supported by the sponsor, that this support is effective to take care of the appellant's financial needs and that there is frequent telephone contact through which emotional support is provided to one another. There is also the relevance of the longstanding personal care the appellant provided for his father over a protracted period as well as the appellant's poor mental health which provides further evidence of mutual dependency beyond what could be expected in a normal loving family.
12. In considering the issue of proportionality, I am required to have regard to the matters set out in section 117B of the 2002 Act, as amended. Those matters including that the maintenance of effective immigration control is in the public interest. In this case, the appellant does not speak English however he is currently financially supported and accommodated by the sponsor.
13. I acknowledge the issue of historic injustice and have considered the findings in *Ghising* [2013] UKUT 567 (IAC). In particular, I accept that the fact that an adult child has been prevented from following their parents due to an historic injustice is a relevant factor in the proportionality exercise. I am also bound by what was said in *Pun* [2017] EWCA Civ 2016:
 20. *The critical feature for the right to rely on the historic injustice is dependency...Both the FTT and the Upper Tribunal...have found that there is no dependency and that, to our mind, prevents the historic injustice from having the same considerable weight it must have for adults dependent on their parents at the time when the application is made."*
14. In the appellant's case, the unchallenged evidence is that the appellant is emotionally and financially dependent on the sponsor. Documentary evidence of that dependency has been provided along with a consistent, coherent account provided by the sponsor.

15. The sponsor would have settled in the United Kingdom earlier were it not for the historic injustice and the appellant would have been born here and been a British citizen. Given the foregoing findings, I have attached weight to the historic injustice issue. I conclude that considering all matters, including the appellant's emotional and financial dependency on the sponsor, that the appellant's circumstances are sufficiently compelling to outweigh the public interest considerations applicable in this case.
16. In conclusion, the respondent's decision to refuse the appellant entry clearance was disproportionate given the circumstances.

Decision

The appeal is allowed on human rights grounds.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 May 2023

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 any fee which has been paid or may be payable for the following reason. The evidence upon which the appeal was allowed was before the respondent in this case, including that related to the appellant's mental health.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 May 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).**

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email