Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU056702015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 April 2017	**On 2 May 2017**

Before

DUPTY UPPER TRIBUNAL JUDGE MONSON

Between

MR BISHAN THAPA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms Keelin McCarthy, Counsel instructed by Everest Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge IF Taylor sitting at Stoke on 1 July 2016) dismissing his appeal on the papers against the decision of an Entry Clearance Officer to refuse him entry clearance as the adult dependant relative of his father, a former Gurkha. The First-tier Tribunal had not made an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 20 February 2017, Upper Tribunal Judge Finch granted the appellant permission to appeal for the following reasons:

> "The decision reached by the First-tier Tribunal Judge was a very brief one and did not give sufficient reasons for dismissing the appeal. In addition, the Judge did not make any findings in relation to the letters from the office of the Village Development Committee, which stated that the appellant was unemployed and dependent upon his father and mother. As a consequence, I find that the First-tier Tribunal Judge did make arguable errors of law."

Relevant Background

3. The appellant is a national of Nepal, whose date of birth is 26 June 1985. On 25 May 2011, the appellant's father was issued with entry clearance for the purpose of settlement as a Gurkha veteran. His mother was granted indefinite leave to enter the United Kingdom in line with his father. Both of them took up residence in the United Kingdom on 17 August 2011. The appellant was living in the same household as his parents at the time when they applied to settle in the United Kingdom. He did not make a settlement application himself as he was not eligible under the discretionary policy which was announced on 21 May 2009. This policy enabled members of the Brigade of Gurkhas who were discharged before 1 July 1997 to obtain settlement on a discretionary basis as a result of their service. The policy also covered spouses and children under the age of 18 at the date of application. It expressly excluded children aged over 18 at the date of application.

4. The policy was adjusted at the beginning of January 2015 to allow adult children of former Gurkhas to be granted settlement in certain circumstances. The new policy applied to applications made on or after 5 January 2015. The appellant made an application for settlement after 5 January 2015. On 7 August 2015 an Entry Clearance Officer (post-reference NEDE/3800125) gave his reasons for refusing the appellant's application. He accepted that the appellant met the qualifying criteria for consideration under the Home Secretary's policy as outlined in Annex K. His sponsor was present and settled in the UK. His sponsor had been granted settlement under the 2009 discretionary arrangements. The appellant was outside the UK at the time of application, and he had been under the age of 18 at the time of his sponsor's discharge. It was accepted that the sponsor would have made an application to settle before 2009, had the option to do so been available to the sponsor on his discharge from the Gurkhas before 1 July 1997.

5. However, in order to qualify for entry clearance under the policy, an applicant must not normally have lived apart from the sponsor for more than two years at the date of application or at any time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the applicant lived away) - for example, he had spent

time at a boarding school, college or university as part of his full-time education during term time, but he had resided in the family home during the holidays.

6. His mother and father had migrated to the United Kingdom on 17 August 2011. So, both his parents had been present and settled here for over three years and ten months at the time of his current application. So, he had been living apart from his sponsor for more than two years on the date of application. This was as a direct result of his parents migrating to the UK, rather than as the result of him being away from the family unit as a consequence of educational or other requirements. While the policy previously in force had prevented him from gaining entry to the UK, neither parent had decided to remain in Nepal with him in a family unit.

7. He has stated that he was unemployed and that he was emotionally and financially dependent upon his parents. However, he was 30 years of age at the date of application. His parents had migrated to the United Kingdom by choice, over three years and ten months before the date of his application. There was no evidence of any care arrangements having been put in place by his sponsor before he migrated to the United Kingdom. His parents were content to leave without him, without making any obvious care arrangements for him. So his parents had treated him as an adult, who was able to care for himself.

8. He was in good health, having completed his higher secondary studies in 2010, and having spent the majority of his life in Nepal. There were no obvious factors preventing him from working in Nepal. There was no evidence of his living conditions being anything but adequate. There was no obvious reason why his father was unable to continue supporting him financially, if he was to remain in Nepal. No care arrangements or requirements in Nepal had been declared. He had not mentioned any personal incapacity, and he had not declared any medical conditions or disability. So, he was not satisfied that the appellant was financially and emotionally dependent upon his UK sponsor, as required under Annex K, paragraph 15.

9. The Entry Clearance Officer went on to consider Article 8 ECHR and the cases of **Gurung [2013] EWCA Civ 8** and **Ghising [2013] UKUT 00567 (IAC**). He said that he was satisfied that the reasons for refusal outweighed the consideration of historical injustice. Family life could continue as it may have done in the past. He had not established family life with his parents over and above that which normally exists between an adult child and his parents. This was shown by the sponsor's decision to move to the UK without him. The effect of the historic injustice had not been such as to prevent him from leading a normal life in Nepal. So, it did not outweigh the proportionality assessment under Article 8.

The Decision of the First-tier Tribunal

10. The appellant asked for his appeal to be decided without a hearing. In his

subsequent decision promulgated on 19 July 2016, Judge Taylor said that he had been assisted by a slim bundle of documents from the respondent, but there had been no bundle of documents provided by the appellant. He also had possession of the appellant's notice of appeal containing his grounds of appeal dated 2 September 2015.

11. As noted at paragraph [7] of his decision, the appellant's case in the grounds of appeal was that his parents had made visits once a year from the UK to Nepal in order to see him, and that therefore the family unit had been maintained by these visits and also by contact on the telephone. As a consequence, he had not in fact been apart from his parents for more than two years. He further submitted that the evidence of their visits to Nepal clearly showed that he was emotionally dependent upon his parents.

12. In paragraph [8], the Judge noted that paragraph 15 of the policy said that evidence of financial dependency may include the fact that the applicant has not been supporting him or herself and working, but has been financially supported "*out of necessity*" by his sponsor, who has sent money regularly from the UK.

13. At paragraph [9], the Judge noted the appellant's case in the grounds of appeal that his parents were supporting him regularly by sending him money, as evidenced by recent remittance slips, and that his father would bring him money. He also said that sometimes he had to borrow money from a neighbour, and the money was paid back when his parents came to visit him. He stated that Nepal, being an underdeveloped country, had very limited job opportunities available, and it was almost impossible for British Gurkha families to access job opportunities there.

14. The Judge set out his findings at paragraphs [11]-[17]. He found that the appellant had been separated from his parents for more than two years, and there was no argument to suggest that the family unit had been maintained, notwithstanding the appellant living away, because the separation was not of a result of education or something similar which might include working away for some time.

15. He accepted that regular remittances had been sent to the appellant by his father, and also that when his father visited the appellant, he took some money with him. But under paragraph 15 of the policy, the appellant had to establish that this money was out of necessity. The evidence from the Office of the Village Development Committee was that the appellant had been taking care of the land owned by his father, "*which suggests he receives an income from this land and/or is self-sufficient.*"

16. In any event, the appellant was 30 years of age at the date of application, and there was no obvious factor preventing him from working in Nepal. There was no evidence that his living conditions were anything other than adequate, and his father could still support the appellant financially if he remained in Nepal. He was not satisfied that the appellant was financially

and emotionally dependent upon his sponsor. Accordingly, he did not meet the requirements of the respondent's policy.

17. At paragraph [17], the Judge addressed Article 8 ECHR. He said that with regard to Article 8 and the two cases of **Gurung** and **Ghising**, he was not satisfied that the appellant enjoyed family life with his parents in the United Kingdom. Family life between adults was only established where there are emotional ties between the adults which went beyond the emotional ties to be expected. In the circumstances of this case, he was not satisfied that there were any ties that went beyond the normal ones to be expected. Although the appellant was sent money, this was not out of necessity. As the appellant did not enjoy family life with his parents, any Article 8 argument fell away. With regard to private life, this was confined to his experiences in Nepal.

18. The Judge dismissed the appeal under the respondent's policy, and also on human rights grounds.

The Hearing in the Upper Tribunal

19. For the purposes of the appeal to the First-tier Tribunal, the appellant relied on legal representatives based in Kathmandu, Nepal. For the purposes of his appeal to the Upper Tribunal, the appellant instructed Everest Law Solicitors. They compiled a bundle of documents for the hearing in the Upper Tribunal which contained a considerable amount of material which did not appear to have placed before the First-tier Tribunal. At my invitation, Ms McCarthy focused on the documents which had been seen by the First-tier Tribunal Judge.

20. Ms McCarthy had prepared an extensive skeleton argument. She developed her error of law challenge by reference to this skeleton argument and by reference to the documentary material which was before the First-tier Tribunal Judge. She submitted that the Judge had set too high a standard of proof. He had not applied the correct test with regard to the existence of family life, or with regard to dependency. The Judge also failed to consider all the relevant evidence. There was no absolute requirement for there to be emotional dependency in order for family life between adult children and parents to exist. It was also not required under Article 8 that the financial dependency should be a dependency of necessity.

21. On behalf of the Secretary of State, Mr Melvin relied on the fact that the documents before the Judge included a land ownership registration certificate showing that the sponsor was the owner of four parcels of cultivated land. So, it would be a reasonable inference, he submitted, that the appellant could make a living from agriculture. It was a matter for the appellant what evidence he chose to provide to the First-tier Tribunal by way of appeal, and he could not sustainably complain about the outcome. Although brief, the decision dealt with all the salient evidence and issues.

22. In reply, Ms McCarthy submitted that the Judge had wrongly conflated the exercise of considering the appellant under the policy with the exercise which was required under Article 8 ECHR. The Judge had not adopted the correct approach to resolving whether the appellant qualified for entry clearance under Article 8 ECHR.

Discussion

23. As well as the land registration certificate relied on by Mr Melvin, the First-tier Tribunal Judge had before him the following documents which are pertinent to the error of law challenge.

24. In a letter dated 22 August 2015, the sponsor said as follows:

> "He is depending on us, though he is compelled to live in Nepal at my own home, *looking after his married brother, Milan Thapa* (my emphasis)."

25. On 15 April 2015, the Records Office for the British Gurkhas in Pokhara issued a certified copy of the "*Kindred Roll"* held by the Records Office in respect of the sponsor's relatives. The relatives on the Kindred Roll comprise the sponsor's wife, three sons, two daughters, and the sponsor's parents. The sponsor's second son is Milan Thapa, who was born on 14 October 1982.

26. There is a translation of a recommendation letter issued by the Office of the Village Development Committee. According to the translation, the date of the recommendation letter is 20 August 2015. However, one version of this document bears "a verification of a true copy of original' stamp, apparently made by a notary public on 2 August 2015. The letter states that the parents of Mr Bishan Thapa had gone to the UK, "*letting their youngest son to take care of the land owned by his father; as there is not any income source for livelihood and nourishment of Mr Bishan Thapa, his father Mr Khadka Bahadur Thapa is bearing all his financial expenses."*

27. In an earlier letter dated 2 February 2015, the Chief District Officer for Syangja District certified that the appellant was unmarried and living in the guardianship of his parents, without doing a job at any Government or non-Government offices.

28. This letter does not in terms confirm that the appellant is unemployed. All it confirms is that he is not doing a job at any Government or non-Government office.

29. With regard to the letter from the Office of the Village Development Committee, Ms McCarthy submits that the Judge's finding at the end of paragraph [13] is perverse and/or inadequately reasoned, as the finding is directly contradicted by the contents of the letter. However, the claim made in the letter is a non-sequitur, since the role of taking care of land is likely to lead to an income being generated and/or a means of subsistence, rather than the opposite. It is also contradicted by the

surrounding evidence, which is that the land which the appellant has been left behind to look after includes cultivated land. So it was open to the Judge to attach no weight to the bare assertion made in the letter, having regard to the guidance given in **Tanveer Ahmed.**

30. Moreover, assuming the role of a caretaker of property is a form of employment, for which the appellant could expect to be remunerated by his father. The appellant was also, according to his father, employed in another useful role, which was to look after his married brother, Milan Thapa.

31. Although not cited to me, I have had regard to **Muse & Others v Entry Clearance Officer [2012] EWCA Civ 10** on challenges to the adequacy of a judge's reasons. In **South Bucks District Council v Porter (2) [2004] UKHL 33**, cited with approval by the Court of Appeal at paragraph 33, Lord Brown said:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need only refer to the main issues in the dispute, not to every material consideration."

32. Although the "absence of income or means of subsistence" claim made in the letter from the Office of the Village Development Committee was a material consideration, the Judge was not bound to refer to it. His reasoning does not give rise to a substantial doubt that he failed to reach a rational decision on relevant grounds.

33. It was open to the appellant to elect for an oral hearing, at which his father would have had the opportunity to give oral evidence in support of his appeal, and thus to be cross-examined on the letter from the Office of the Village Development Committee and on his own statement.

34. On the limited evidence that was before the First-tier Tribunal, it was open to the Judge not to be satisfied that the appellant was financially or emotionally dependent upon his father, and I consider that the Judge has given adequate reasons for reaching this conclusion.

35. It follows inexorably from the Judge's sustainable findings of fact that questions 1 and 2 of the **Razgar** test did not fall to be answered in the appellant's favour, on either family or private life grounds. So there was no error in the Judge holding that the appellant could not succeed on Article 8 grounds outside the scope of the policy. The question of historic injustice did not arise in a discussion on proportionality, as the appellant

had not discharged the burden of proving that Article 8 was engaged. The Judge did not apply too high a standard to the question of whether there was family life, given: (a) the appellant's age, (b) the length of separation from his parents, (c) his clear ability to live independently from his parents without the supervision of a carer; and (d) the responsibilities with which he had been entrusted.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and so the decision stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed Date 25 April 2017

Judge Monson
Deputy Upper Tribunal Judge