



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01470/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 September 2018

Decision & Reasons Promulgated
On 9 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ENTRY CLEARANCE OFFICER - NEW DELHI

Appellant

and

YAM BAHADUR GURUNG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. I. Jarvis, Home Office Presenting Officer

For the Respondent: Mr. R. Jesurum, Counsel instructed by Everest Law Solicitors

DECISION AND REASONS

1. In a decision promulgated on 24 April 2018 I set aside the decision of the First-tier Tribunal. The appeal came before me to be remade.
2. For the purposes of this decision I refer to the Entry Clearance Officer as the Respondent, and to Mr. Gurung as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

3. I heard oral evidence from the Sponsor, Mr. Amar Bahadur Gurung, and his wife, Mrs. Sirimaya Gurungseni. Both representatives made oral submissions. I reserved my decision.
4. I have taken into account the documents in the Respondent's bundle, the Appellant's bundle (80 pages followed by Annex K), the Appellant's addendum bundle (93 pages), a letter from the Greenwich Gurkha Ex-Servicemen Association dated 13 September 2018, a letter from the Sponsor's wife's doctor dated 11 September 2018 plus attachments, and the skeleton argument.
5. At the outset of the hearing Mr. Jarvis stated that the one issue, as far as the Respondent was concerned, was whether there was family life between the Appellant and Sponsor. He accepted that, were I to find that there was family life, and therefore Article 8(1) was engaged, the appeal should be allowed. The Respondent had not raised any public interest issues which would reduce the weight to be given to the historic injustice.

Burden of proof

6. The burden of proof lies on the Appellant to show that the Respondent's decision is a breach of his rights to family and private life under Article 8 ECHR. The standard of proof is the balance of probabilities.

The Respondent's case

7. The Respondent's case is set out in the notice of decision. I do not intend to set out in detail here the part relating to the policy as it was accepted at the error of law hearing that the Appellant did not meet the requirements of the policy, and that the appeal was brought under Article 8 outside the immigration rules. As set out above [5] it was agreed that the one issue before me was whether there was family life between the Appellant and his parents.
8. In relation to family life under Article 8, in the decision the Respondent stated that the Appellant had grown up in Nepal. His parents chose to apply for settlement visas when the Appellant was already an adult in the full knowledge that adult children do not automatically qualify for settlement. There was no bar to the Appellant's parents returning to Nepal either permanently or temporarily. He had been living in Nepal without his parents for nearly two years and had been able to continue to live independently. He had a number of other siblings in Nepal who were not applying to settle in the United Kingdom. Family life could continue as it may have done and without interference by the decision.
9. The Respondent stated that he was not satisfied that the Appellant had established family life with his parents over and above that between an adult child and parents. This was further evidenced by his parents' decision to move to the United Kingdom without him.

10. The Entry Clearance Manager (“ECM”) reviewed the decision on 18 March 2017 but did not reverse it. He did not accept that Article 8 was engaged.

The Appellant’s case

11. The Appellant’s case is set out in the documents referred to above [4] and the oral evidence at the hearing. I do not intend to set out the Appellant’s case in full here as it is contained in these documents and in the Record of Proceedings. I will refer to the evidence as and when necessary in coming to my decision.

Findings and conclusions

12. I found the Sponsor and his wife to be honest witnesses who answered all questions put to them and were not evasive. There was some confusion regarding their children in the evidence of Mrs. Gurungseni, but their evidence was consistent. Their evidence is consistent with the documentary evidence, and with the evidence of the Appellant. I find that their evidence can be relied on.
13. In considering whether there is a family life between the Appellant and his parents, I have considered the case of Rai [2017] EWCA Civ 320, in particular [17], [36] and [39].
14. Paragraph [17] of Rai states as follows:

“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”.”

15. In [36] it states that the “concept to which the decision-maker will generally need to pay attention is “support” - which means, as Sedley L.J. put it in Kugathas, “support” which is “real” or “committed” or “effective””. The Court of Appeal clarified that there was no need to show any exceptional or compelling circumstances above and beyond this dependence.
16. Paragraph [39] states:

“The Upper Tribunal judge referred repeatedly to the Appellant's parents having chosen to settle in the United Kingdom, leaving the Appellant in the family home in Nepal. Each time he did so, he stressed the fact that this was a decision they had freely made: “... not compulsory but ... voluntarily undertaken ...” (paragraph 20), “... having made the choice to come to the [United Kingdom]” (paragraph 21), “... the willingness of the parents to leave ...” (paragraph 23), and “... their voluntary leaving of Nepal and leaving the Appellant ...” (paragraph 26). But that, in my view, was not to confront the real issue under article 8(1) in this case, which was whether, as a matter of fact, the Appellant had demonstrated that he had

a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did."

17. I find that the Appellant was living with his parents prior to coming to the United Kingdom in March 2015. However I find that between 2010 and 2013, the Appellant was living in Dubai where he had moved for work. The issue is whether or not family life was re-established when the Appellant returned from Dubai to Nepal in May 2013.
18. In the Appellant's additional witness statement dated 13 September 2018 he stated that he went to the UAE in January 2010 where he worked as a security guard. He found living and working in the UAE very hard. When he had the chance, he spoke to his parents and told them about his life in the UAE. His mother kept asking for him to return and his father encouraged him to look for other options.
19. The Appellant states that he was very unhappy in the UAE, and that when his father told him of his struggles taking his mother to clinics and hospitals, he expressed his desire to return home. He wanted to look after his parents. He returned to his parents in May 2013 and immediately took on the responsibility of taking his mother to the clinics and hospitals. He would carry her if she got tired during the journeys to hospital.
20. The Sponsor said in his additional statement dated 12 September 2018 that the Appellant only went to the UAE because he told him to and arranged it for him. He stated that the Appellant kept complaining that his work was very hard and he was struggling. His wife's health was deteriorating and he was getting too old to look after her on his own so he asked his son to return to Nepal. He said that the Appellant was keen to return to Nepal due to the conditions in the UAE.
21. In her additional statement dated 12 September 2018 the Appellant's mother said that she told the Appellant to come back from Dubai "from day one", but the Sponsor thought that letting the Appellant be in Dubai would make him independent. She said that she missed the Appellant very much. The Sponsor called the Appellant back after 18 months or so, but he came back in 2013 because his employer had kept his passport.
22. At the hearing the Sponsor said that he had asked the Appellant to return home but there was some delay as his passport was withheld from him. In his first witness statement dated 30 October 2017 the Sponsor said that it took the Appellant several months to return to Nepal. He wanted to return earlier but his employer kept his passport. The Appellant said in his first witness statement dated 28 October 2017 that when he tried to quit work his employer threatened to report him to the police and did not return the passport. He was forced to work for another year. He was finally released and returned home to his parents [5].

23. I find that, once the Appellant returned home, he started caring for his mother who has multiple health problems including diabetes, hypertension, osteoarthritis, diabetic retinopathy and cataracts. The Appellant said in his additional statement that he lived under the same roof, looking after his parents. He used to cook and clean for them as well as having the responsibility of taking his mother to clinic and hospital. The Sponsor said in his additional statement that the Appellant would take his wife to clinic or hospital [5]. He said that the Appellant would carry her on his back when she was tired of walking. The Appellant used to cook and clean for them and give medicine at to his mother. "In short, Yam was looking after us in every way."
24. In her additional statement the Appellant's mother said that the Appellant took her to hospital and clinic, and cleaned and cooked for them. All three of them referred to the evening walks which they would take on the advice of the doctor.
25. As stated above, I found the Sponsor and his wife to be honest witnesses and accept their evidence. I find that when the Appellant returned from the UAE this was at the behest of his parents owing to the health of his mother, but also owing to the Appellant's own unhappiness in Dubai. I further find that he would have returned earlier were it not for the fact that his passport was withheld by his employer. It was accepted by Mr. Jarvis at the hearing that the Appellant would have returned earlier were it not for the fact that his passport was being withheld. I further find that his mother wanted the Appellant to return almost as soon as he had gone, but that it was his father who thought it might bring the Appellant some independence.
26. I find that on return to Nepal the Appellant resumed family life with his parents. I find that he was living with them as part of a family unit who all cared for and supported one another. I find that there was a physical reliance, at times quite literally, by the Appellant's mother on the Appellant. However, I find that it was not only a physical reliance, but that there was an emotional connection between the Appellant and his parents.
27. I find that he was not living independently of his parents. I find that they were living together as a family unit. I find, following the case of Rai, that the support that was given to the Appellant by his parents was real, effective and committed, as was the support given by the Appellant to his parents. I accept that there is a level of cultural expectation on a son to look after his parents, but I find that it was also the Appellant's choice to return to his parents from Dubai rather than just a cultural expectation that he should return. I find that it was the Sponsor who had arranged for the Appellant to go to Dubai, and that it was the Appellant's and Sponsor's will that he should return as the Sponsor realised that he could not cope, and realised that the Appellant was unhappy and wanted to return. I find that the Appellant did not return reluctantly merely in order to perform his cultural duty, but that he wanted to return back to his parents. On return, I find that they developed a reciprocal bond, re-establishing family life between them.

28. I therefore find that family life was resumed between the Appellant and his parents when the Appellant returned from Dubai to Nepal in 2013. I find that family life continued until the Sponsor left to come to the United Kingdom. I find that it has continued ever since. I find that there was no intention that family life should end when the Sponsor came to the United Kingdom. All three members of the family gave evidence in their witness statements as to the effect of the separation. The Appellant stated that he missed the company of his parents for everything that they did together in Nepal ([9] of his additional statement). The Sponsor said that he missed him, and that he was not only him who was emotionally attached to his son, but also his wife. The Appellant's mother said that she missed him more and more. I find that the Appellant speaks to his parents using Viber sometimes every day, but at least two to three times a week.
29. I find that the Appellant has not established an independent life since the Sponsors came to the United Kingdom. He is still living in the family home. He lives there alone. I find that he is still financially dependent on the Sponsor who sends him money through Ria. I find that he is not employed.
30. I find that the Appellant and his parents have a family life between them which has not been brought to an end by the Sponsor's departure. I find that this family life was re-established when the Appellant returned from Dubai to Nepal in 2013. I find that the support, both emotional and financial, that the Sponsor gives to the Appellant is real, committed and effective.
31. I therefore find that there is family life sufficient to engage the operation of Article 8. It was accepted by Mr. Jarvis at the hearing that, were I to find that there was family life between the Appellant and Sponsor, the appeal should be allowed in accordance with the authorities.
32. Headnote (4) of Ghising and others [2013] UKUT 00567 (IAC). states:
- "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 Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy."*
33. It was accepted by Mr. Jarvis that the Respondent was not relying on any other factors in the Appellant's case beyond the maintenance of effective immigration control.
34. I have taken into account the factors set out in section 117B of the 2002 Act, insofar as they are relevant. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. However, this is somewhat lessened in these circumstances following Ghising. In relation to sections 117B(2) and 117B(3), the weight to be given to the English-language skills and financial independence of

the Appellant does not outweigh the weight to be given to the effect of the historic injustice. Sections 117B(4) to (6) are not relevant.

35. The Sponsor was discharged in 1971, 14 years prior to the Appellant's birth. In his first witness statement the Sponsor said that, had he been given the opportunity to settle in the United Kingdom, he would have done so and the Appellant would therefore have been born in the United Kingdom.
36. I find that the Appellant has shown that he had a family life with his parents when they left Nepal. I find that this family life has endured beyond their departure. I find that the Appellant is not living an independent life. I find that family life continues and I therefore find that, given the historic wrong, and taking into account Ghising, the balance comes down in favour of the Appellant. With reference to Ghising, I find that the Appellant has shown on the balance of probabilities that the decision is a breach of his rights, and those of the Sponsor, and his mother, to a family life under Article 8.
37. I have not made an anonymity direction.

Notice of Decision

The Appellant's appeal is allowed on human rights grounds, Article 8.

Signed

Date 3 October 2018

Deputy Upper Tribunal Judge Chamberlain