



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/16736/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 20 April 2018**

**Decision Promulgated
On 27 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ENTRY CLEARANCE OFFICE - NEDE

Appellant

and

**KIRAN LIMBU
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr S Jaisri (counsel) instructed by Sam, solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Lawrence, promulgated on 9 August 2017, which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 4 October 1990 and is a national of Nepal. The appellant applied to join his father who has been granted settlement in the UK on the basis of his service in the UK Armed Forces. On 13 June 2016 the Secretary of State refused the Appellant's application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge NMK Lawrence ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 12 February 2018 Resident Judge Appleyard gave permission to appeal stating

3. The respondent now seeks permission to appeal. The grounds are arguable. They assert inadequate reasoning in relation to emotional dependency, how such dependency goes beyond the "normal ties between adults", failure to attach weight to the public interest and the use of speculation.

4. Although the grounds are arguable, contrary to paragraph 5 thereof the Judge has clearly made a finding in respect of the appellant's ability to speak English. It is within paragraph 25 of his decision.

The Hearing

5. (a) For the respondent, Mr Lindsay moved the grounds of appeal. He told me that there were two challenges. He took me to [9] of the decision and told me that the Judge's findings on emotional dependency are inadequate reasoned. He told me the Judge clearly considers financial dependency did not give reasons for concluding that there is emotional dependency between the appellant and his father. He told me that in the absence of those reasons the entire decision is unsafe.

(b) Mr Lindsay told me that the test for emotional dependency and the test to establish whether article 8 family life exists between adults are both set out in Kugathas[2003] EWCA Civ 31. He told me that there is nothing in the Judge's decision capable of supporting the Judge's finding of emotional dependency.

(c) Mr Lindsay's second point related to consideration of historic injustice. It is not disputed that historic injustice is a legitimate factor in the article 8 proportionality assessment. He took me to [11] of the decision and told me that there the Judge does not consider whether an historic injustice has occurred nor whether the sponsor would have brought the appellant to the UK as a child.

(d) Mr Lindsay told me that the decision contains clear material errors of law and should be set aside.

6. (a) For the appellant Mr Jaisri told me that the decision does not contain any errors. He told me that at [9] the Judge makes clear findings about emotional dependency. He told me that the Judge had taken well-reasoned approach and made findings based on the evidence.

(b) Mr Jaisri took me to [13], [14] and [18] of the decision and told me that the Judge's article 8 ECHR assessment is beyond criticism. He told me that the Judge correctly took guidance from Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320.

(c) Mr Jaisri told me that at [17] the Judge makes clear sustainable findings in relation to historic injustice. The findings are brief, but focused and relevant and go straight to the heart of the proportionality assessment. He told me that the decision does not contain errors and urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. In PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 it was held that some tribunals appeared to have read Kugathas [2003] EWCA Civ 31 as establishing a rebuttable presumption against any relationship between an adult child and his parents or siblings being sufficient to engage Article 8. That was not correct. Kugathas required a fact-sensitive approach, and should be understood in the light of the subsequent case law summarised in Ghising (family life - adults - Gurkha policy) [2012] UKUT 160 (IAC) and Singh [2015] EWCA Civ 630. There was no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 nor was there any requirement of exceptionality. It all depended on the facts. The line of case-law was again considered in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 (in the context of the adult son of a former Gurkha soldier).

8. The appellant was 25 years old at the date the respondent made the decision in this case. He is now 26 years old. The Judge starts [9] of the decision with a clear finding that the appellant is emotionally and financially dependent upon his father. The Judge then sets out his reasons for that finding. After considering the financial aspect of dependency the Judge devotes the second half of [9] of the decision to emotional dependency. The Judge correctly takes guidance from Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320.

9. The only competent ground of appeal is on article 8 ECHR grounds. The Judge turns to article 8 from [11] of the decision. Before reaching [11], the Judge has already found that the appellant meets the requirements of the immigration rules. The Judge correctly takes guidance from Kugathas, Ghising & RP(Zimbabwe) before reaching his conclusion that family life, in terms of article 8, is established. He then embarks on a proportionality assessment. At [17] the Judge succinctly makes the crucial finding that in this case there has been an historic injustice because the appellant's father would have settled in the UK when he was discharged from the

British Army if he had been able to take the appellant, as a child, with him.

10. At [18] of the decision the Judge draws all of his findings together to take a cumulative assessment of the facts as the Judge found them to be, after taking guidance from SSHD v HK(Turkey)[2010] EWCA Civ 583.

11. Judge makes clear, reasoned, sustainable findings in relation to emotional dependency, in relation to family life continuing between an adult child and his father, and in relation to historic injustice. The Judge then factors each of those findings into an holistic proportionality assessment, after taking correct guidance in law.

12. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him.

13. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law.

CONCLUSION

14. No errors of law have been established. The Judge's decision stands.

DECISION

15. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Paul Doyle
2018

Date 26 April

Deputy Upper Tribunal Judge Doyle