Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08077/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2017	**On 16 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR MILAN GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Jesurum, Counsel instructed by Everest Law Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Nepal born on 18 March 1985. He appealed to the First-tier Tribunal against the refusal of his application for entry clearance to settle in the United Kingdom as a dependent son of Kharka Bahadur Gurung, a former Gurkha. The refusal by the respondent is dated 7 April 2015. In a decision

and reasons promulgated on 16 February 2017 Judge of the First-tier Tribunal Phillips dismissed the appellant's appeal on human rights grounds.

Error of Law

2. The appellant appealed and was granted permission including on the basis that in the Court of Appeal in **Rai v Entry Clearance Officer (New Delhi) [2017] EWCA Civ 320** the Court of Appeal identified that it was wrong for the Upper Tribunal to concentrate on the decision of an applicant's parents to leave Nepal and settle in the UK, without focusing on the practical and financial realities entailed in that decision. Although Judge Phillips did not have the benefit of the Court of Appeal's decision it was arguable that as this consolidated existing jurisprudence rather than changing the approach, the First-tier Tribunal did not properly apply existing case law. The Grounds before me were as follows:

   Ground 1 – insufficient direction of law on Article 8(1) family life;

   Ground 2 – failure to consider evidence.

3. At the beginning of the hearing Ms Holmes conceded that including for the reasons given in the grant of permission there was an error of law and both parties agreed that the Upper Tribunal could re-make the decision on the basis of submissions, Ms Holmes declining to make any indication other than that the Court of Appeal in **Rai** did not assist the respondent's case.

4. The respondent was correct in that submission. The First-tier Tribunal took the wrong approach in finding that the appellant had not discharged the burden of showing emotional dependence on the sponsor.

5. It is the case that dependence is arguably not a requirement and that what may constitute an extant family life falls well short of what constitutes dependency (see **Patel & Others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17**, Selby LJ at [14]. In addition, the judge's approach to the evidence before her was flawed and she was incorrect in asserting whether there was an absence of evidence of use of a bank card as the evidence before the First-tier Tribunal included the sponsor's bank statements from April 2014 (page 61 of the appellant's bundle) and this shows five ATM withdrawals between 22 April 2014 and 30 May 2014. This is then followed by money transfers from the sponsor to the appellant which was further evidenced at pages 62 to 63.

6. In finding that it was inconsistent that the appellant now uses cheques when the sponsor had left his bank card, the First-tier Tribunal failed to give adequate reasons for that finding and why she rejected the evidence before her as summarised above, if that was the case. In addition, the judge failed to give reasons why she did not accept the evidence of the sponsor including as there was information and documents before the First-tier Tribunal including of the sponsor's exemplary record of conduct in the army and who was found by his commanding officer to be "completely reliable". It is unclear in this context what the inconsistency was that the judge found there to be. The First-tier Tribunal also failed to give adequate reasons

for her finding that the "appellant cannot properly be said to be residing with his mother", purporting to distinguish **AA v UK [2012] Imm AR1,** which confirmed such residence is a relevant factor in considering family life. There was no challenge to the evidence that the appellant and his mother were living in the same house and the judge had found that the appellant's mother chose to spend the majority of her time there, returning to Nepal in January 2014. In finding that it was not the appellant's dependency which had led the appellant's mother to make the decision to spend the majority of her time in Nepal, the judge approached the issue from an erroneous perspective, the 'wrong end of the lens', rather than looking at the cohabitation and then assessing dependency.

Re-making the Decision

7. As I am satisfied there are material errors of law in the First-tier Tribunal decision I have proceeded to re-make that decision in light of the evidence before me and the submissions. As indicated, these consisted of the submissions of Mr Jesurum as Ms Holmes conceded that she was in difficulty and had no submissions to make.

Background

8. It is undisputed that the appellant's father and the sponsor in this case served in the Gurkhas for fifteen years and was discharged in 1989 but was unable to apply to settle in the United Kingdom at that stage and was not given the opportunity to do so until 2009, at which stage the appellant was no longer a minor. It has always been maintained that if that had not happened the appellant would have accompanied the sponsor as a minor to the United Kingdom, the appellant having been 4 years of age when his father was discharged from the army. The appellant appeals the refusal of the respondent, of entry clearance, dated 7 April 2015. It is not in dispute that the appellant cannot meet the Immigration Rules and can only be considered under Article 8 and the relevant policy.

9. It is common case that prior to 1997 veterans of the Brigade of Gurkhas were denied the opportunity for settlement until 2004 and this was found to be an historic injustice in **R(on the application of Limbu & Others) v SSHD [2008] EWHC 2261 (Admin)**. It was not until a further policy was introduced in 2009 that this provided the first opportunity for all adult children to apply for entry clearance. The policy was amended in 2015 to remove the requirement of exceptionality, in light of the Court of Appeal decision in **Gurung [2013] 1WLR 2546.**

10. I have considered the five stage test set out in **R (Razgar) v Secretary of State for the Home Department [2004] 2AC 368** . It is settled law that the Article 8 rights of both the appellant, the sponsor and the appellant's mother i.e. all family members must be considered (**Beoku-Betts [2009] 1AC 115**).

11. In considering whether family life exists between the appellant and his family members in this case I have considered all the evidence. The appellant was born in 1985. His father was granted indefinite leave to enter on 27 July 2009 and his mother was granted indefinite leave to enter on 14 December 2009. The appellant's father

entered the UK on 27 February 2010 and his mother on 12 April 2011. I accept, and such is not disputed, that the appellant resided with the family until his mother's departure to the United Kingdom and that there was no opportunity for the sponsor to apply prior to 2009.

12. I accept that it is a relevant consideration that the sponsor faced a choice between taking up settlement (or losing it after two years under paragraph 20 of the Immigration Rules) or continuing his family life as it was. There was considerable evidence before me, including in the form of extracted passport stamps, that both the appellant's father and mother have returned to Nepal for extended periods from 2011 onwards. The appellant's mother in particular returned home for over a year and a half from 2014 to 2015 and was cohabiting with the appellant at the date of decision (and it was not disputed that the date of decision was the relevant date for the purpose of this appeal).

13. In terms of financial dependence the appellant, the sponsor and his mother have all maintained that the appellant is, and has been, financially dependent on the sponsor who left his bank card. In addition to his bank card there was evidence that the sponsor's bank had specific written authority for the appellant to access that account, as well as sending remittances of £100 a month. Ms Holmes did not submit that there was any inconsistency in the evidence before me and I do take into account the credibility of the sponsor as evidenced, including his discharge from the army. In accepting that the appellant is financially dependent on his parents I have further considered that he is not in employment and is not married and that the appellant also depends on his parents for his accommodation in Nepal.

14. It was the evidence of the entire family that regardless of the appellant's age he remains emotionally close to his parents. This is evident in the fact that the appellant's mother effectively returned to live with her son and has continued the relationship as it has always been. There was in addition evidence before me of continued close contact between the parties including by phone and viber.

15. In deciding on whether family life exists, the test is whether "something more exists than normal emotional ties" (**Kugathas v SSHD [2003] EWCA Civ 31**) and relevant factors include who the near relatives are, the nature of the links, age, where and with whom the appellant has resided in the past and the nature of contact. I accept that in order to establish whether family life exists it is not necessary to find that that support is indispensible which it is unlikely to be in an appellant over 30 years old. However, I have considered the nature of the ties and note that Sedley LJ in the dissenting opinion in **Kugathas**, found dependence to mean real support, effective support or committed support. It is particular in this context that the Upper Tribunal in **Ghising [2012] UKUT 160** confirmed that **Kugathas** had been interpreted too restrictively in the past and the Court of Appeal in **Patel** (supra) confirmed that family life can exist without indispensible support.

16. The jurisprudence in this area confirms that the attainment of the age of majority in itself does not end family life and in this case I have taken particular account of the

fact that family life has continued in the family home for the majority of the time with the appellant's mother returning, together with strong evidence of continued financial and emotional support, which can be reciprocal with both the appellant being the recipient of that support and also offering such support to his parents. I am satisfied that there is evidence of continuing mutual support and dependency between the appellant, his father and his mother in all areas of their lives, not least because the appellant's mother returned to live with her son for extended periods (although that is not the sole consideration). I am satisfied that there is real, committed and effective support of the appellant by his parents. In such circumstances I am satisfied that family life exists.

17. I then go on to consider whether there would be interference with that family life in the respondent's refusal and I am satisfied that that question must be answered in the affirmative and that given the low threshold such interference is sufficiently serious to engage Article 8, such interference is in accordance with the law and for the purposes of maintaining effective immigration control. Therefore I have gone on to consider whether such interference is proportionate. In so doing I must have regard to Section 117 of the Nationality, Immigration and Asylum Act 2002, the public interest consideration and I have taken into account that Section 117B represents the ordinary interests of immigration control. (**Dube (Sections 117A-117D) [2015] UKUT 90**).

18. I have taken into account that there is no evidence of the appellant's proficiency in English language or of financial independence and that therefore the public interest is engaged in this respect. However I have considered that in the context of the respondent's policy and as already noted Ms Holmes made no submissions on this point.

19. I must give appropriate weight to the historic injustice. I have reminded myself that the historic injustice is not the only issue to be considered, when in reality there are many factors. **Patel v ECO (Mumbai) [2010] EWCA Civ 17** confirms that whilst the interests of immigration control would in most cases outweigh Article 8 rights, in historic cases the reverse is true and the approach in **Patel** is a compensatory one in terms of "righting the law". The starting point is that those denied entry earlier should be put in the position that they would have been but for that law.

20. The Court of Appeal in **Rai [2017] EWCA Civ 320** confirmed that whilst the Tribunal must have regard to Section 117B including that the maintenance of effective immigration control is in the public interest, it was also correct that given the historic injustice such considerations under Section 117B in themselves, would not make an adverse difference to the outcome of the case

21. In considering whether the decision to refuse the appellant is a disproportionate interference with, what I found to be the family life in this case, I have considered as set out in **Ghising & Others** (above) that a bad immigration history or criminal behaviour may tip the balance in the respondent's favour but that if all that is relied on the public interest decide or in the interests of immigration control "the weight to

be given to the historic injustice will normally require a decision in the appellant's favour".

22. It was not in dispute that there is no question of either a bad immigration history or criminal behaviour in this case and I have considered further in the appellant's favour that the sponsor sacrificed many years of his family life in order to serve in the British Army, serving well in excess of the four years necessary to qualify for settlement, and that his access to his family during that time in terms of visits and his family being able to join him was greater than that endured by other soldiers of the British Army (see **R (Purja) v MOD [2004] 1WLR 289**).

23. I am satisfied that the respondent's decision represents a disproportionate interference with family life.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law and is set aside. I re-make the decision allowing the appellant's appeal.

No anonymity direction is made.

Signed Date 12.01.2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee was paid or payable so no fee award is made.

Signed Date 12.01.2018

Deputy Upper Tribunal Judge Hutchinson