Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05300/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 May 2017	**On 30 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASIJ GURUNG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss A Fijiwala, Home Office Presenting Officer
For the Respondent: Mr R Rai, Counsel, instructed by Sam Solicitors

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Nepal. On 21 August 2015 the appellant (hereafter the Entry Clearance Officer or ECO) refused his application for an entry clearance to settle in the UK as the

adult dependant relative of his father who is an ex-Ghurkha soldier. At the time of his application the claimant was aged 31 years and 2 months. The ECO considered his application in relation to the Home Secretary's policy as outlined in Annex K, IDI Chapter 15 Section 2A 13.2 as amended on 5 January 2015. The claimant appealed that refusal. In a determination sent on 21 October 2016 First-tier Tribunal (FtT) Judge A Kelly allowed his appeal on Article 8 grounds.

2. The ECO's grounds of appeal were fourfold. It was submitted that the judge erred in (1) reversing the burden of proof; (2) making a finding of financial and emotional dependence that was against the weight of the evidence; (3) failing to correctly apply the provisions of s.117B of the NIAA 2002; and (4) incorrectly treating the claimant as a victim of historical injustice.

3. I am grateful to both representatives for their concise submissions.

4. I can be relatively brief in addressing grounds (1) – (3). In respect of (1), Miss Fijiwala did not seek to pursue it further and I think she was right not to do so because it seems clear that in referring in paragraph 24 to there being "no other compelling reasons for excluding the appellant from the United Kingdom" the judge was simply trying to encapsulate what she took to be the guidance given by the Court of Appeal in **Gurung and others [2013] EWCA Civ 8** and the Upper Tribunal decision in **Ghising and others (Ghurkhas/BOCs: historic wrong; weight)** especially paragraph 5 of the headnote in **Ghising**. Whilst the words used could be read as reversing the burden of proof, it is sufficiently clear that the judge was simply meaning to convey she had applied the guidance given in **Gurung** and **Gising**.

5. As regards (2,) whilst in my view the judge's findings on dependency are at the extreme end of a spectrum of reasonable decisions that could have been made about the claimant's dependency, I cannot accept that such findings were not open to the judge. Even though the appellant was aged 31, was not in full-time education and appeared not to have sought employment out of choice, the judge's assessment of his situation was nevertheless characterised by dependency in that he still relied on his parents emotionally (and in this context the judge attributed weight to Nepalese cultural and family patterns) and financially and that would remain the case until he married. In short, I consider the ECO's second ground amounts to a disagreement with the judge's findings of fact rather than identification of an error of law. Miss Fijiwala's trawl through case law to try and demonstrate an error in the judge's finding of fact has not persuaded me there was such an error.

6. In relation to ground (3), it is first of all clear that the judge had regard to s.117B consideration generally: see paragraph 19. However, it does seem to me that the judge misapplied s.117B(2). At paragraph 20 she stated:

> "20. This case concerns Article 8 family life, so that subsections (4) (5) & (6) of section 117B are inapplicable in this case. In respect of section 117B(2), I am not satisfied that the appellant speaks English. The sponsor's witness statement states that the appellant's education was minimal and that he only completed his studies up to grade 10. This counts against him. However, he is physically fit and healthy and I see no reason why he could not learn English and obtain employment in this country once he has adapted to life here."

7. The judge's reasoning here betrays an error of approach. The test as set out in s.117B provides that:

> "It is in the public interest and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English."

The provision is in the present tense. It does not contemplate that this requirement will be met simply because it is considered a person could learn English after arrival in the UK. Mr Rai sought to argue that this provision had to be read in the light of s.117B(2)(a) – (b) which identify the reason for this consideration as being:

> "because persons who can speak English ...
>
> (a) are less of a burden on taxpayers; and
>
> (b) are better able to integrate into society."

He pointed out that the judge found that the appellant would not be a burden on taxpayers and would be able to "adapt"/integrate. However, I am not persuaded that subparagraphs (a) and (b) justify a purposive rather than an ordinary meaning construction of s.117B(2). The purpose of subparagraphs (a) and (b) is to identify the public interest rationale for imposing these considerations; it is nor to alter their meaning.

8. A further error in the judge's treatment of s.117B is that she wholly misapplied the relevance of s.117B(3) which identifies that it is in the public interest that persons who seek to enter or remain in the UK "are financially independent". It was central to the judge's assessment of the claimant's case that he was financially dependent. Whilst that lent support to the judge's assessment that the claimant met one of the requirements of the relevant policy, it should still have been weighed in the Article 8 proportionality assessment against the claimant. The appellant's was an appeal brought on Article 8 grounds only; it could not be brought on the basis of accordance or otherwise with the Immigration Rules as such. (For the same reasons as given above for concluding that s.117B(2)(a) – (b) do not assist in interpreting s.117B(2). I do not consider that subparagraphs (a) and (b) of s.117B(3) can assist the claimant either.

The fact was that he was not financially independent. Hence the judge's understanding of and application of s.117B consideration was vitiated by legal error.

9. Turning to ground (4), I consider that here too the respondent is right to identify legal error. The judge clearly considered that the claimant should be regarded as someone who had suffered an historical injustice. At paragraph 22 the judge stated:

> "22. I am quite satisfied that had the appellant's family been afforded the opportunity to settled in the United Kingdom prior to 2010 then they would have done so. The sponsor applied for entry clearance immediately after the respondent's policy towards Ghurkha veterans changed in 2009 and he made the necessary arrangements to travel to this country as soon as his entry clearance visa was granted. The respondent's own policy towards Ghurkhas was changed once again on 5th January 2015 to allow a child of a Ghurkha who was over 18 but under 31 to join their parent in the United Kingdom. By this time, the appellant had turned 31 and so narrowly missed out on being able to benefit from this change in policy. However, the respondent's policy does not have the status of law and I am not bound to reflect what is arguably an arbitrary distinction between a person who is under the age of 31 and one who is just over the age of 31."

10. Further at paragraph 21 the judge treated the claimant's case as falling within the "historic injustice" category for an erroneous reason. He stated it was because "... the appellant [claimant's] father was deprived of the opportunity to settle in the UK in the 1970s. Had he done so I find that it is unlikely that the [claimant's] childhood would have been spent in the UK". There is more than one fault in the judge's assessment that the claimant's case fell into the "historic wrong/injustice" category. First of all, there is nothing in the decided authorities to support the view that the claimant's case is one of historic injustice. In **Gurung** at paragraph 18 the Court of Appeal stated that the Ghurkha had to be able to show that "but for the historic injustice he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him." The policy as set out in Annex K (dated 22 January 2015) stated at paragraph 17 that:

> "**Historical Injustice**
>
> 17. In order to qualify for settlement under this policy the Home Office needs to be satisfied that the former Gurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then (but otherwise the child would have been born here)."

In the claimant's case there was no basis for concluding he would have been born in the UK. The claimant's father left Ghurkha service in 1971. The claimant was not born until January 1984. The policy arrangements announced in May 2009 required applicants to normally meet a number of conditions including:

> "6. The applicant was under 18 years of age at the time of the former Ghurkha's discharge ..."

As stated in Annex K of the Home Office guidance dated 22 January 2015:

> "**Age at time of former Ghurkha's discharge**
>
> 16. The applicant must have been under 18 years of age at the time of the former Ghurkha's discharge. If this age condition is not met, the application must be refused under this policy on this basis. Please note that an adult child born after the sponsor's discharge will qualify under this policy if all other conditions are met."

11. Secondly, the claimant did not meet all the other conditions of the policy, he did not meet the condition that he be "4. ... 18 years of age or over and 30 years of age or under on the date of application ...". Thirdly, in seeking to disregard the failure of the claimant to fulfil this condition the judge erroneously relied on a 'near-miss' argument. The only reason given for not accepting the limits of the policy was that the distinction between a person who is under 31 and one [like the claimant] who is just over the age of 31 was that it is "arguably an arbitrary distinction". Leaving aside that "arguable" arbitraririness is not the same as established arbitrariness; the judge provided absolutely no reasons for concluding that this age limit was arbitrary. It is common sense that there had to be some age limit and that dependency as continuing into adulthood even to 30 years was if anything an overgenerous point at which to draw the line. As stated by the Tribunal in **Ghising** at 20, the policy by its terms was "capable of addressing the historic injustice and contained within it a flexibility which would avoid conspicuous unfairness."

12. For the above reasons I conclude that the judge erred in law and her decision should be set aside. I consider I am in a position to re-make the decision without further ado. The claimant did not meet the requirements of the Immigration Rules at the date of decision and did not fall within applicable Home Office policy on adult dependants of ex-Ghurkha soldiers. Whilst still emotionally and financially dependent on his parents, his dependency was not such as to warrant him being granted settlement to join his parents. His parents make clear in their witness statement that they have put in place "core arrangements" for their son. Understandably they do not feel that they can "fully support" the claimant whilst he is living in Nepal, but I do not consider they have substantiated their claim

that he is "completely alone" in Nepal. He may be without close family there, but the evidence does not suggest that he is without any network of friends. There is no evidence of any significant medical difficulties. Further, the claimant and his parents have been able to maintain family life ties through several visits the parents have paid to Nepal. The three also communicate regularly by electronic means. In a certain class of cases it will not be enough to expect a dependent child and his or her parents to maintain contact at a geographical distance, but given the age of the claimant and the fact that he is able to live in Nepal without financial hardship, I do not consider that his case comes within such a class.

13. For the above reasons I conclude that the decision of the ECO to refuse the claimant entry clearance was not contrary to his human rights as it was a proportionate reason in the context of his specific circumstances. At the date of decision I do not consider there were compelling circumstances warranting a grant of entry clearance. Whilst unlike the ECO I have accepted there was emotional and financial dependency, I do not consider this outweighs the public interest consideration applicable in this case.

14. For the above reasons:

    The FtT materially erred in law and her decision is set aside.

    The decision I re-make is to dismiss the claimant's appeal.

15. No anonymity direction is made.

Signed Date: 26 May 2017

Dr H H Storey
Judge of the Upper Tribunal