



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08654/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24 April 2018

Decision & Reasons Promulgated
On 7 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

KHUSHI MAN GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr D Balroop, Counsel
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is the adult child of Mr Deo Parsad Gurung, a former member of the Brigade of Gurkhas ("the sponsor"). He was discharged on 16 June 1971 after nearly six years' service. His military conduct was rated very good. The appellant appealed against a decision of the respondent Entry Clearance Officer, dated 26 February 2016, refusing him leave to enter to join his parents, who have been settled in the UK since July 2011. The dispute in the appeal has been whether the decision amounted to a breach of article 8 of the Human Rights Convention. The respondent decided family life did not exist as between the appellant and his father but, even if it did, any interference with family life was outweighed by the legitimate interest in maintaining effective immigration control.

2. The appeal was heard by Judge of the First-tier Tribunal Farrelly, sitting at Taylor House, on 26 June 2017. He was unable to find that the appellant was either emotionally or financially dependent's father. The appellant was a 32-year old male who had lived apart from his parents more than four years. Whilst his parents had visited for holidays in 2013, 2014 and 2015, staying for several months, and had also sent remittances, the judge did not find this was out of necessity. He found they had returned and sent funds out of their natural love and affection for their children and to visit their home country. He noted the appellant had indicated that he had continued to work the family land, growing crops. The judge saw nothing which would suggest the appellant was not capable of living independently. He found the appellant was an adult who had been living independently. In short, family life had not been shown. In the alternative, if family life were shown, the decision would be proportionate. He concluded, bearing in mind that there was no evidence the appellant had any command of English and his parents had limited resources, he would become a burden on the state. He concluded the decision would be proportionate.
3. The grounds seeking permission to appeal argued the judge had not provided sufficient reasons for his findings. In particular, the judge did not provide reasons for his finding that the appellant's parents did not send remittances out of necessity. Likewise, there were no reasons for the finding that the appellant was capable of living independently. Reliance was placed in the well-known guidance provided in *MK (duty to give reasons) Pakistan* [2013] UKUT 641 (IAC). This case stated that a bare statement that a witness was not believed was unlikely to satisfy a requirement to give reasons. The grounds pointed out there was no suggestion the dependency had been contrived. The grounds also argued the judge had failed to consider the issue of the historic injustice, as discussed in *Ghising & Ors (Gurkhas/BOCs: historic wrong; weight) Nepal* [2013] UKUT 567 (IAC).
4. Permission to appeal was granted by the First-tier Tribunal on the basis that it was arguable that the brief consideration of the evidence of dependency was inadequate.
5. No rule 24 response has been filed.
6. I heard submissions from the representatives on the issue of whether the judge's decision was vitiated by material error of law.
7. Mr Balroop said the test in ex-Gurkha cases was whether there was "real or "committed" or "effective" support (see *Rai v ECO, New Delhi* [2017] EWCA Civ 320, at [17]). His challenge was essentially that the judge failed to give adequate reasons for his findings on the issue of dependency, which was the crux of the appeal. There was evidence before the judge that the appellant needed the money sent by his parents to survive. If he did not accept that, the judge was under a duty to say why. Alternatively, he said the judge erred in regarding the section 117B factors as determinative of the decision on proportionality (see again *Rai v ECO, New Delhi*, at [55-57]).
8. Ms Everett argued the decision was adequately reasoned. She pointed out that, the older an applicant is, the harder it becomes to show dependency on elderly parents. It was understandable the family wanted to be together and that the parents helped out their son. However, the judge was entitled to find this did not add up to dependency

meeting the test in *Rai v ECO, New Delhi*. She accepted the decision was “quite sparse” but maintained there was no error of law.

9. Mr Balroop argued the approach in ex-Gurkha dependant cases was different because the family had been forced to separate by the original “historic injustice” and the way the policy had been rolled out. He suggested this lowered the threshold of showing family life.
10. I reserved my decision as to whether the decision is vitiated by a material error of law.
11. The judge’s findings on the issue of family life are set out in the following paragraphs:

“11. Clearly the appellant does not meet the terms of the policy. He is over the age of 30. His parents came to the United Kingdom in July 2011 and he applied in February 2016. Consequently, they have been apart from more than two years.

12. I do not find that the appellant is either emotionally or financially dependent upon his sponsor. He is now 32 years of age and has lived apart for over four years. I acknowledge that his sponsor and the appellant’s mother have visited for holidays in 2013, 2014, and 2015, staying for several months. I also accept they have sent remittances. However, I do not find this is of necessity. They have returned and sent funds out of natural love and affection for their children and to visit their home country. I do not see a dependency situation.

13. In oral evidence the appellant indicated that he continued to work the family land growing crops. It is claimed that the land is not sufficient to sustain the family and he goes to work for other farmers. Nevertheless, I do not see anything which would suggest he is not capable of living independently. Undoubtedly remittances from his sponsor help the family. Notably, they are not specific to the appellant. However, if these were absent I find the appellant could still sustain himself. I do not see evidence of any emotional dependence beyond the norm of natural love of parent and child. The appellant is an adult who has been living independently.

14. The appellant does not meet the terms of the policy. The policy is meant to be compliant with article 8. In terms of his freestanding article 8 rights I do not find it established that such bonds of dependency exist to show an ongoing family life. Instead, they are now leading separate lives.”

12. Ms Everett was clearly right to describe the judge’s reasoning as “sparse” but the issue is, of course, whether the reasoning is adequate. In *MD (Turkey) v SSHD* [2017] EWCA Civ 1958, Singh LJ considered the extent of the duty to give reasons and, in particular, the question of adequacy. He said as follows,

“26. ... It is important to appreciate that adequacy in this context is precisely that, no more and no less. It is not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons is, in part, to enable the losing party to know why she has lost. It is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case some error of approach has been committed.”

13. Treacy and Longmore LJ agreed with Singh LJ.

14. I have concluded in the light of this binding authority that the reasons given by the judge in this case are adequate. I agree that he could have done more to explain his thinking. However, to adopt the language of the Court of Appeal, it is “tolerably clear” that, having taken account of all the evidence, he formed the view that the appellant was an adult living independently in Nepal. His personal circumstances were such that he benefited from the remittances provided by his parents (which were shared with others) but the judge was not satisfied he was unable to manage without them. In terms of emotional support, the judge accepted that his parents have made lengthy visits to their homeland but was not satisfied that this was necessary in order to provide the appellant with emotional support. Mr Balroop accepted that these findings were open to the judge on the evidence. His complaint solely related to the adequacy of the reasons for the findings. In my judgement, applying the test enunciated by the Court of Appeal, the reasoning set out in the paragraphs above provide the appellant with adequate reasons explaining why he lost his appeal.
15. As far as Mr Balroop’s argument that the test of family life is different in cases involving ex-Gurkha dependants, he relied on [17] of *Rai v ECO, New Delhi*. In that paragraph, Lindblom LJ begins by referring to the well-known authority of *Kugathas v SSHD* [2003] EWCA Civ 31, highlighting the need to show that something more exists than normal emotional ties. There is then a short reference to the case of *Patel and others v ECO, Mumbai* [2010] EWCA Civ 17, which appears to run together the issues of the existence of family life and historic injustice. I do not find it is necessary to decide whether Mr Balroop is right to argue that there is a lower threshold for the existence of family life because of the factor of historic injustice in the case of an adult dependant of an ex-Gurkha because it would not make any difference to the outcome. On the facts found, the appellant was in his early 30s and living independently.
16. Finally, having found that there was no error in the judge’s approach to the question of family life, any error he made in the alternative concerning the proportionality balancing exercise is immaterial.
17. The appellant’s appeal is dismissed. The decision of Judge Farrelly does not contain a material error of law.

Notice of Decision

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal shall stand.

No anonymity direction is made.

Signed

Date 25 April 2018

Deputy Upper Tribunal Judge Froom