



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09171/2016

THE IMMIGRATION ACTS

Heard at Field House
On 17 August 2018

Decisions & Reasons Promulgated
On 12 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

SHER BAHADUR BUDHA THAPA

Applicant

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: Mr T. Melvin, Home Office Presenting Officer

REASONS FOR FINDING AN ERROR OF LAW

1. The appellant is the son of a former Nepalese Gurkha. His birth certificate stated that he was born on 2 July 1983. A document produced by a village Development Committee stated in 2009 that he was born on 2 July 1985. His army record stated that he was born on 1 June 1983. However, a passport issued on 20 November 2005 by the Nepalese authorities gave his date of birth as 2 July 1985 which, for my purposes, I shall treat as the preferred date of birth. He is now 33 years old.
2. The appellant's father was born on 13 July 1947. The appellant's father served in the Brigade of Gurkhas for about 16 years and was discharged with an exemplary record. Wrongly, he had been and denied an opportunity to settle in the United Kingdom and this wrong was corrected in 2009 when the father was granted settlement.

3. The appellant's father was permitted to enter the United Kingdom on 11 September 2009 and did so on 24 January 2010, accompanied by the appellant's mother. By that time the appellant had returned to Nepal.
4. In January 2008 when, according to the judge, the appellant was aged 24, the appellant went to work in the United Arab Emirates and remained there until some time before his parents left for the United Kingdom. During this time he was working in full-time employment sending money to his parents to support them who, at that time, were not working in Nepal.
5. The appellant applied for settlement in about January 2016.
6. Since arriving in the United Kingdom, the appellant's parents have made regular visits to Nepal. The father returned to Nepal in January 2011, November 2012, November 2014 and October 2015. In each case he stayed for a period of months. There was also some evidence of financial support provided to the son from his parents.
7. In *Ghising and others (Ghurkhas/BOCs: historic wrong; weight)* [2013] UKUT 00567 (IAC) Upper Tribunal Judges Lane (now Lane J) and Taylor summarised the Tribunal's view as follows:

(2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).

(3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.

(4) 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.

(5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or

criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance.

8. In *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320 (28 April 2017) (Beatson, Lindblom and Henderson LJJ) in which Mr Jesurum appeared for the appellant, the Court of Appeal was concerned with a father, Birkha Bahadur Rai, who was born in Nepal on 1 January 1941, enlisted in 7 Gurkha Rifles as a boy in 1956 and served for 15 years and was honourably discharged in August 1971. Rai's father was granted indefinite leave to enter on 13 May 2010, and came to the United Kingdom on 26 June 2010. His mother joined her husband. On 2 October 2012 the appellant, then 26 years old, applied for entry clearance to settle in the United Kingdom as his father's dependant.
9. The Court of Appeal in *Rai* cited the authority of *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 00160 (IAC) in which I sat with Lang J. The Upper Tribunal in paragraphs 52 to 61 gave detailed reasons for finding that the concept of family life went beyond the authority most frequently cited of *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 and the often-cited passage: '*Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.*' The Tribunal concluded in paragraph 62:

The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1).

10. In *Rai*, the Court of Appeal concluded in paragraph 41 and 42

The burden of the evidence of the appellant's father and mother in their witness statements, and the appellant's in his, was this: that, in consequence of the "historic injustice", it was only in 2010 that his father had been able to apply for leave to enter the United Kingdom; that his parents would have applied upon the father's discharge from the army had that been possible; that they could not afford to apply at the same time as each other or with their dependent children – the appellant and their daughter Chandra; that the stark choice they had had to make was either to remain with the appellant and Chandra in Nepal or to take up their long withheld entitlement to settle in the United Kingdom; that they would all have applied together if they could have afforded to do so; that the appellant had never left the family home in Nepal, begun an independent family life of his own, or found work outside the village; and that he had remained, as his father put it, "an integral part of the family unit" even after his parents had settled in the United Kingdom.

Those circumstances of the appellant and his family, all of them uncontentious, and including – perhaps crucially – the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal judge under article 8(1). In my view they should have been. They went to the heart of the matter: the question of whether, even though the appellant's parents had chosen to leave Nepal to settle in the United Kingdom when they did, his family life with them subsisted then, and was still subsisting at the time of the Upper Tribunal's decision. This was the critical question under article 8(1). Even on the most benevolent reading of his determination, I do not think one can say that the Upper Tribunal judge properly addressed it.

11. Some of the facts in *Rai* are strikingly similar. However, some are very different. The First-tier Tribunal judge concluded in paragraph 17 of the determination that there was no family life between the appellant and his parents. In doing so, the judge referred to the fact that he moved to another country and became self supportive which meant that family life was broken at that point. The implication of this is that once an individual leaves home and lives an independent life, there can be no resumption of family life by any subsequent activities. The change is irreversible. Family life was broken at that point and, inferentially, could never be resumed. He conceded that the appellant had returned to Nepal but that family life was broken by reason of the time spent by the appellant in the UAE. Thus, a protected family life can never be resumed once a period of independence is established. On this basis he concluded that there was no family life between the appellant and his parents. Although he also did not accept that the appellant was financially dependent on the sponsor, it is at least arguable that this was a finding that was predicated on his finding that no family life existed.
12. The First-tier Tribunal Judge's determination was made on 18 September 2017. It makes no reference to the decision of the Court of Appeal in *Rai* made on 28 April 2017.
13. I have concluded that this is too simplistic a finding in the context of a Gurkha case. The break in continuity when the appellant went to work in the UAE is, of course, a relevant factor if only because it is part of the narrative. However, I am unable to follow the judge's conclusion that it was determinative. That crucial part of the determination is not supported by adequate reasoning. In particular, the fact that he found that the appellant had returned to Nepal and the family home prior to the parents' departure was not treated as having any weight or, indeed, relevance. I see no justification expressed in the determination that entitled the judge to place weight on one element of the history (time in the UAE) and, indeed to treat it as determinative and then to place no weight on the fact that he returned and resumed a lifestyle that was, presumably, similar to the one he had adopted prior to his departure. It raises an issue which is apparently unfamiliar to the Tribunal that once there has been

a break in the continuity of a dependency, there can be no subsequent resumption of it. Without this issue being addressed in the determination, I find that judge's conclusion amounts to an error of law.

14. In rejecting that Article 8 was engaged at all, it was inevitable that the judge did not consider the protean concept of family life as suggested in *Ghising (family life - adults - Gurkha policy)* [2012] UKUT 00160 (IAC). The judge did not then go on to consider whether, but for the historic wrong, the appellant would have been settled in the UK long ago. This would ordinarily determine the outcome of the Article 8 proportionality assessment in an appellant's favour, where the matters relied on by the respondent consist solely of the public interest in maintaining a firm immigration policy, per *Ghising and others (Ghurkhas/BOCs: historic wrong; weight)*. Nor did the judge explore whether the appellant and his parents might have applied at the same time for leave to enter the United Kingdom and would then have come to the United Kingdom together as a family unit, per *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320. For the reasons I have given the judge stopped short of exploring these issues.
15. I set aside the determination of the First-tier Tribunal and direct that the appeal be re-determined afresh in the First-tier Tribunal.

ANDREW JORDAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL
4 September 2018