Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11756/2015**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 15 March 2018 **On 29 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

HASTA BAHADUR GURUNG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A Everett, Home Office Presenting Officer.
For the Respondent: Ms R Dulay, counsel.

DECISION AND REASONS

1. This is an appeal by the respondent against a decision of the First-tier Tribunal allowing an appeal by the applicant against the Entry Clearance officer's decision of 27 October 2015 refusing him entry clearance to settle in the UK as the dependent son of his father, a former Gurkha soldier. In this decision, I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Entry Clearance Officer respondent as the respondent.

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Background

2. The appellant is a citizen of Nepal born on 10 September 1986. His father served in the Brigade of Gurkhas for 15 years, being discharged on 14 August 1981 with his military conduct assessed as exemplary. At that stage he was not able to apply for settlement in the UK but following a change in the respondent's policy, he and his wife were granted indefinite leave to remain in the UK on 1 March 2007. They have five children, three daughters who live in the UK, all of whom are married with their own families. Their eldest son is married and living in Nepal with his family. The appellant is the youngest child.

3. In 2007 the appellant applied for entry clearance to join his parents, but he included false educational documents with his application and this was one of the issues raised when it was refused. His explanation is that these documents were submitted without his knowledge by the person he had paid to make the application.

4. The appellant now lives alone in Nepal after initially living with his aunt. His parents send him money and he has access to their Nepalese bank account. They have visited him on a regular basis for long periods, from 4 April 2009 to 3 March 2011, 9 April 2011 to 29 March 2013, 17 September 2014 to 13 December 2014 and finally from 21 July 2015 to 11 April 2017. The appellant applied for entry clearance to join his parents on 30 September 2015. His application was refused on 27 October 2015, a decision upheld in the entry clearance review after he submitted his notice of appeal.

The Hearing before the First-Tier Tribunal

5. The hearing before the judge proceeded solely on the basis of article 8. It was not argued that the appellant could meet the requirements of the Rules or the published policy in IDI chapter 15, Section 2A, Annex K. The judge reminded herself of the Supreme Court judgment in Hesham Ali v Secretary of State [2016] UKSC 60, that the fact that the Rules were not met was a relevant and important consideration when assessing article 8, of the five-step approach to article 8 set out by Lord Bingham in Razgar [2004] UKHL 27 and of the Upper Tribunal's findings in Lama (video recorded evidence – weight – Art 8 ECHR) [2017] UKUT 16 that there were no hard and fast rules as to what constituted family life within the compass of article 8. She found that, despite the appellant's age (29 at the date of application), he was the youngest in the family and the only child who had not married and started his own family. He was financially dependent on his parents but, perhaps more unusually, for a 31-year-old man (his age at the date of hearing) he was emotionally dependent on them which was why, despite ill health and advancing age, his parents had returned regularly and for long periods to Nepal. The judge found that more than the usual emotional ties existed between the appellant and his parents and that family life was established for the purposes of article 8.

6. The judge then went on to consider whether the respondent's decision to refuse entry clearance was proportionate, taking into account the public interest in maintaining immigration control and protecting the economic well-being of the country. In [17] she identified the following four factors as weighing in the appellant's favour:

   (i) the historic wrong arising from the inability of Gurkha soldiers to settle in the UK until the Rules were changed,
   (ii) the fact that had the appellant's father been granted settlement under the 2009 discretionary arrangements, the appellant would have met the relevant paragraphs of annex K,
   (iii) his parents had made extended visits to Nepal which would not be possible going forward because of his father's ill-health and
   (iv) his father had offered loyal service to the UK in his military service.

7. The judge said that she had to apply the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) and having considered them, she was not persuaded that there were any factors which particularly weighed in the public interest requiring a refusal of the appeal. Accordingly, the appeal was allowed on human rights grounds.

The Grounds and Submissions

8. In the grounds it is argued that the judge found the appellant to be emotionally and financially dependent upon his parents, but she did not appear to have regard to any evidence of regular communication such as postcards, text messages and conversations. The respondent did not dispute that family life existed but simply that the evidence did not show elements of dependency beyond the normal emotional ties between adults. It is argued that it was pure speculation on the judge's part that, were it not for the historic injustice remedied by the Gurkha settlement policy, the appellant's father would have chosen to settle in the UK on discharge from the army in 1981.

9. Further, the judge failed have proper regard, so it is argued, to the public interest considerations set out in s.117B of the 2002 Act. There were no relevant findings on the appellant's ability to speak English, to maintain financial independence or to integrate into British society. Finally, the grounds argue that the judge had entirely overlooked the fact that the appellant had submitted false documents in support of a previous application. In consequence, she had failed to make a balanced proportionality assessment.

10. In her submissions Ms Everett's primary focus was on whether the judge had been entitled to find that family life existed within article 8(1). She submitted that she had failed to give any adequate explanation for that finding and had conflated different elements of family life. She accepted that when assessing proportionality, the judge had been entitled to take into account the historic injustice, but she should have given full consideration to the public interest considerations in s.117B.

11. Ms Dulay submitted that, in substance, the grounds amounted to no more than a disagreement with the judge’s findings of fact. It was accepted that the appellant was financially and emotionally dependent on his parents, a dependency illustrated by the length of their visits to Nepal. She submitted that the approach taken by the Court of Appeal in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320, supported her submission that the judge had reached findings properly open to her. As far as proportionality was concerned, the judge had noted the point about the false document, but the appellant had given an explanation. She had referred in [18] to s.117B and had considered those factors but had found that there were no particular factors weighing in the public interest to offset the other factors she had identified.

Assessment of Whether the Judge Erred in Law

12. The grounds and submissions essentially raise two issues. Ms Everett's primary submission was that the judge erred in law in finding that family life within article 8 was established. I have been referred to the judgment of the Court of Appeal in Rai. The judgment of Lindblom LJ at [19] confirms that whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant aspects of the particular case. He also endorsed the comment of the Upper Tribunal in Ghising (family life – adults – Gurkha policy) [2012] UKUT 160 that “[the] different outcomes in cases with superficially similar features emphasises to us that the issue under article 8 (1) is highly fact sensitive”.

13. The judge accepted the evidence that the appellant had been and continued to be financially dependent upon his parents but, more significantly, he was also emotionally dependent on them. In the grounds it is argued that the judge failed to have regard to the lack of evidence of regular communication but that completely overlooks the evidence accepted by the judge that his parents had made four long visits between 2009 and 2017. She was also entitled to take into account the cultural background set out in the witness statements that in Nepalese families an unmarried child was regarded as a part of his parents' family until he married. I am satisfied that the judge's finding of fact that article 8 was engaged in the particular circumstances of the appellant was a finding property open to her for the reasons she gave.

14. The other issue in dispute is whether the judge erred in law in her assessment of proportionality. I am satisfied that there is no substance in this ground. She reminded herself that the fact that the appellant did not meet the requirements of the Rules was a relevant and important consideration in the assessment of proportionality. She set out the factors weighing in the appellant's favour in [17]. Whilst she did not deal at any great length with the provisions of s.117B of the 2002 Act, she took them into account. There is no reason to believe that the judge left out of account the issue of the false documents, having referred to the appellant’s explanation or that she failed to give proper weight to the public interest. I am satisfied that when weighing up the pros and cons, as

the judge put it, she reached a decision properly open to her. In summary, I am not satisfied that the judge erred in law in reaching her decision that the appeal should be allowed on article 8 grounds.

Decision

15. The First-tier Tribunal did not err in law and its decision stands. No anonymity direction was made by the First-tier Tribunal.

Signed H J E Latter Date: 26 March 2018

Deputy Upper Tribunal Judge Latter