Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/11830/2015
HU/11832/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th February 2018	**On 22nd March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) ANIRUDRA GURUNG
(2) GANESH GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellants: Ms M S N Nnamani (Counsel), Howe & Co Solicitors
For the Respondent: Mr C Avery (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Robinson, promulgated on 25th April 2017, following a hearing at Hatton Cross on 7th April 2017. In the determination, the judge allowed the appeal of the Appellants, whereupon the Respondent's Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are sibling brothers, who are both nationals of Nepal, and were born on 28th June 1980 and 19th April 1983 respectively. They appeal against the decision of the Respondent dated 16th October 2015, refusing their application for entry clearance in order to join and settle with their father, Hikmat Gurung under the policy of the Secretary of State for the Home Office in Annex K of ADI chapter 15 Section 2A 13.2 (as amended on 5th January 2015) and on human rights grounds.

The Appellants' Claim

3. The essence of the Appellants' claim is that they have continuing family life between themselves and their sponsoring father, Hikmat Gurung, following from the Sponsor's use of service to the Crown and the Military Covenant, which foresees that families, as well as servicemen, will be rewarded for their service to the Crown. They maintain that but for the historic injustice done to veterans of the Brigade of Gurkhas in denying them the opportunity to settle earlier, they would have had the right to do so. They seek to place reliance upon **Limbu [2008] EWHC 2261** (at paragraph 72).

The Judge's Findings

4. The judge allowed the appeal on the basis of the facts, namely, that the Appellants were not living alone in Nepal, but were dependent upon their sponsoring father, with whom they had regular contact, and that there was unchallenged evidence that the Sponsor served with the Brigade of the Gurkhas for many years, and on discharge wished to settle in the UK, such that following the holistic approach advocated by the Tribunal in **Ghising [2013] UKUT 00567**, this appeal stood to be allowed.

Grounds of Application

5. The grounds of application state that the judge erred in law because the evidence did not establish that the Appellants had the relevant "family life" with the Sponsor, Hikmat Gurung. Moreover, any "historic injustice" could not make the Respondent's decision under appeal disproportionate, even if issues of proportionality weighed in the Appellants' favour.

6. On 1st November 2017 permission to appeal was granted.

7. On 17th January 2018, a Rule 24 response was entered by Respondent's Counsel.

Submissions

8. At the hearing before me on 28th February 2018, the Appellant was represented by Ms Nnamani of Counsel, and the Respondent was represented by Mr Avery, a Senior Home Office Presenting Officer. Mr Avery submitted that the judge failed to ascertain whether family life

existed in the first place, before moving on to considering whether the decision to refuse was disproportionate or not. For example, under the heading "Decision" the judge observed that, "the application was founded on the continuing family life between Sponsor and Appellants …" (paragraph 20). However, there was no discussion there about precisely what the "family life" was that the Appellants enjoyed with their sponsoring father. In the same way, the closing speech of the Appellants' Counsel was very much focused on the issue of proportionality, the Military Covenant, and the partial satisfaction of the Rules (see paragraph 24) without any emphasis being laid on how the Appellants enjoyed their "family life" with their sponsoring father. All of this was simply being assumed in the determination. It was, however, necessary first to consider whether there was a subsisting family life. This was not considered. No case law was brought into play to demonstrate how, in circumstances where the Appellants were not living with their sponsoring father in Nepal, family life could be shown. It was well-established that there had to be a degree of "emotional dependency" over and above the normal relationships between adults and this had not been done.

9. For her part, Ms Nnamani relied upon the Rule 24 response. She submitted that the judge did look at the nature of the family. He was cognisant of the evidence of the father's visits, the significant health concerns he had, and the support and financial assistance he was still giving the Appellants. There was evidence of photographs of the parents visiting the Appellants. The judge had looked at all the evidence before coming to the decision that he did. There was no error of law.

No Error of Law

10. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law, such that I should set aside the decision, and remake the decision. My reasons are as follows.

11. First, the judge did give very close and careful consideration to whether "family life" existed between the Appellants and the sponsoring father. At least six separate matters are considered. First, there is evidence of emotional support provided by the parents in the UK. Second, the judge was referred to recent case law on how to deal with the various issues. Third, the Appellants had been left in Nepal in 2010 and they were regularly being visited by the parents. Fourth, there were photographs submitted to show the Appellants in their home. Fifth, there was evidence that the parents were finding it increasingly difficult to visit because of their deteriorating health, which was supported by a letter from the local hospital trust. Sixth, the judge was cognisant of the fact that, although the parents were articulate and able to manage themselves, they were not in good health as presented. This was the evidence before the judge (at paragraph 19).

12. Second, the judge's own findings of fact, on the basis of this evidence was that first, the Appellants were not living alone in Nepal. Second, that they

were dependent on their parents, who paid their rent and enabled them to meet their daily needs. Third, that if so far as the physical contact between them is concerned, their contact with their parents depends significantly on their parents' ability to travel. Fourth, the first Appellant's attempt to find work abroad had "proved disastrous and it took him about a year to pay back the manpower company which recruited him to work in Malaysia" (paragraph 25). All of this showed the dependency of the Appellants on their sponsoring father.

13. Third, this tied in with the submissions made right at the very outset by the Appellants' Counsel, who did specifically focus upon the nature of this family, pointing out that the Appellants "were unemployed and dependent on the Sponsor for their necessities. They were members of a close-knit family and photographs of visits to them by family members had been submitted to demonstrate this" (paragraph 15). It was open to the judge to accept this evidence and nothing on the face of it suggested why the judge should not have.

14. The only other issue was that of "proportionality" and the Appellants' Counsel at the outset had also submitted as a follow-up argument, that, "the other major issues to be taken into account in the present case was the lengthy separation and the compassionate circumstances which led to the conclusion that the decision of the Respondent was disproportionate" (paragraph 15).

15. In this regard the "historic injustice" dimension of the Gurkha cases was highly significant, and the judge properly took this into account right at the beginning (at paragraph 7) when referring to the fact that the Sponsor had served with the British Army for seven years, wanted his dependent sons to come to the UK for settlement, "but were told by the Gurkha Settlement Office in Kathmandu that there were no settlement policies for adult dependent children". It was in these circumstances that he had to leave his two sons behind (paragraph 7).

16. Finally, it is significant that at the hearing the Sponsor's wife explained that he and his wife always intended for the Appellants' sons to accompany them to the UK (see paragraph 3 of his witness statement), and there was, as Ms Nnamani makes clear in her Rule 24 response (at paragraph 8), an early application for their son Anirudra which was refused. The evidence before the judge was that the Sponsor could not afford to support the applications of both sons at the same time and he had stated that if he were permitted to live in the UK, after he was discharged from the army, he would have done so (paragraph 19 and 20 of his witness statement). It is against this background, that Ms Nnamani makes it clear (at paragraph 19 of her Rule 24 response) that Judge Robinson noted that the Sponsor and his wife would not be able to continue to travel frequently to Nepal due to their advancing ages and deteriorating health, and that this was enough for the Appellants to be able to demonstrate that they did indeed enjoy family life with their

parents (at paragraph 25 of the determination) as explained by Ms Nnamani in her Rule 24 response (at paragraph 9).

17. Accordingly, the appeal here amounts to nothing more than a disagreement with the findings of the judge. The determination of Judge Robinson is carefully crafted, comprehensive and clearly set out determination. There is no error of law.

Notice of Decision

18. There is no material error of law in the original judge's decision. The determination shall stand.

19. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 20th March 2018