Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13130/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th March 2018	**On 12th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

MR BISHAL LIMBU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms K Pal, Senior Home Office Presenting Officer
For the Respondent: Mr G Duncan, Counsel, instructed by N. C. Brothers & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Lloyd promulgated on 10th July 2017 allowing the Appellant's appeal on the basis of his human rights arising from an application for entry clearance to join his parents in the United Kingdom as the adult dependent child of a Gurkha. Permission to appeal was granted by First-tier Tribunal Judge Chamberlain. The grounds upon which permission was granted may be summarised as follows:

> "The grounds allege that the judge erred in finding that the Appellant was emotionally dependent on his parents. The limited evidence did not demonstrate emotional dependence to the Kugathas standard. Cumulatively, the judge had failed to make a balanced proportionality assessment.
>
> I have carefully considered the decision. It is arguable that the judge has failed to give adequate the decision. It is arguable that the judge has failed to give adequate reasons for finding that the Appellant is emotionally dependent on his parents given the limited evidence before him. The judge states that he accepts the evidence that the Appellant is emotionally dependent on his parents at [16] but without giving any details. At [15] he finds that he has not formed his own family unit, but this does not equate to a finding of emotional dependence on his parents. He notes that the Appellant continued living with his mother until July 2015 but does not refer to any more recent evidence.
>
> It is arguable that the judge has failed to give adequate reasons for the findings of emotional dependence."

2. I was not provided with a Rule 24 reply but was addressed in submissions by Mr Duncan on the Appellant's behalf.

3. I shall refer to the parties by their constitution before the First-tier Tribunal for ease of comprehension.

Error of Law

4. At the close of submissions I indicated that I did not find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

5. In respect of the first Ground of Appeal it centres upon the interpretation of family life and seemingly whether it was engaged or not. The grounds are confusing and inconsistent in that it is stated that the Entry Clearance Officer does not dispute that family life exists but argues that there was no evidence showing evidence of dependency "beyond the normal emotional ties between adults". It was said that there had to be "something more", and reliance was placed upon the Court of Appeal's decision of *AAO v Entry Clearance Officer* [2011] EWCA Civ 840 at paragraph 35. In making her submissions Ms Pal did not forward this ground with any vigour and when I posed to her the question whether the *Kugathas* standard still applied in light of the Court of Appeal authority of *R, (on the application of Gurung & Ors) v Secretary of State for the Home Department* [2013] EWCA Civ 8 – which approved in turn, the Upper Tribunal's seminal decision in *Ghising* [2012] UKUT 00161 (IAC), that the engagement of family life was a fact-sensitive evaluation and one which did not necessarily fall for consideration under the *Kugathas* standard – Ms Pal was unable to explain why such a submission was made on the Entry Clearance Officer's behalf and accepted that *Gurung* was still correct and superseded *Kugathas* and a fact-sensitive-evalutation was required as opposed to a search for something "beyond normal emotional ties

betweeen adults". Turning to my own view, I first observe that in the course of his decision the judge carefully considered the submission made by the Entry Clearance Officer's representative in this regard at paragraph 10 and the reply to those submissions at paragraph 11 from the Appellant's representative. The judge noted at paragraph 12 that there was no indication that the Appellant had worked and his absence in India was for educational purposes. The judge noted at paragraph 13 that, in their evidence, the Appellant and Sponsor had demonstrated that the Sponsor did visit Nepal and had visited the house where the Appellant's mother and the Appellant lived and it was found to be highly unlikely that the Respondent's assertion that there was no contact was true. Therefore I find that it was open to the judge to find at paragraph 13 that there was a continuing relationship and it was likely that the Sponsor would have spent time with the Appellant on the occasions he visited Nepal. The judge also found at paragraph 14 that the Appellant had continued to receive financial support from the Sponsor, that there was no evidence of any other source of financial support to him, and on balance he was financially dependent upon the Sponsor via remittances on a monthly basis to meet his needs. I pause to observe that the evidence of financial support will of course have a basis to it as there is no other indication on the face of the evidence why the Sponsor would remit money to the Appellant other than for his personal needs, given that he did not work, and was therefore not independent. The judge also noted at paragraph 15 that the Appellant had not formed his own family unit and that he did not have a partner or spouse and, perhaps most persuasive of all, that the Appellant remained living with his mother (the Sponsor's wife) until only three months before his own application was made for entry clearance. Therefore, given that the judge heard oral evidence from the Sponsor and given that there was evidence before him, not least in the form of witness statements, from both the Sponsor and Appellant, I am not persuaded that it was not open to the judge to find as he did that the Appellant was financially and emotionally dependent upon the Sponsor and I do not find that there is a material error revealed by Ground 1, alongside my observations regarding the binding authority of *Gurung*, approving the Upper Tribunal's decision in *Ghising* in relation to the engagement and/or enjoyment of family life.

6. Turning to Ground 2, Ms Pal put this ground as submitting that it was not open to the judge to make findings upon the historic injustice rendered to Gurkhas and that this was not a point taken by the Appellant's representative and it was in essence a frolic. I indicated that I was unimpressed with that submission, not least because there was no witness statement from the Presenting Officer or any opportunity for the judge to reply to such a submission (notwithstanding the fact that the term frolic had only been pronounced today for the first time in clarifying the ambit of the ground). In the parties' presence I paused to examine the Record of Proceedings on file from the First-tier Judge and I confirmed to the parties that on page 4 of that Record of Proceedings the First-tier Judge had bullet-pointed that the Appellant's representative sought to rely upon

historic injustice in respect of Article 8(2) and also that the authority of *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320, which the Appellant sought to rely upon, was handed up and paragraphs 38 and 42 were specifically relied upon whilst the Presenting Officer also had the opportunity to know of and address the authority as he had sought to rely on paragraph 58 of *Rai*. Therefore, on that basis, the point was clearly taken by the Appellant's representative before the First-tier Tribunal and the proportionality assessment was properly considered in the context of the authority of *Rai*. In any event, I note that the Court of Appeal's decision in *Rai* is, of course, a binding authority which the First-tier Tribunal would have had to apply, given its binding nature. Finally, for my part, I would hope that the Respondent's impromptu criticism of a First-tier Judge for merely applying a binding decision of the Court of Appeal is a challenge that would not be repeated, at least not without a sound evidentiary and legal basis basis for doing so.

7. As such I do not find that the decision should be set aside in accordance with the requisite standard identified in *R, (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982.

Notice of Decision

8. The appeal to the Upper Tribunal is dismissed.

9. The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 12 April 2018

Deputy Upper Tribunal Judge Saini