



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11428/2018

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2019

Decision & Reasons Promulgated
On 13 September 2019

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR DILIP TAMANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jaja, counsel instructed by Everest Law Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Kainth, promulgated on 25 April 2019. Permission to appeal was granted by Upper Tribunal Judge Reeds on 17 July 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. On 31 December 2017, the appellant, then aged thirty-four, applied for entry clearance in order to join his sponsor Lakh Bahadur Tamang in the United Kingdom. The sponsor who is a retired member of the Brigade of Gurkhas, was issued with entry clearance on 4 March 2010, having been granted settlement in the United Kingdom in 2009. He entered the United Kingdom on 14 September 2010.
4. In refusing that application in a decision dated 23 March 2018, the Entry Clearance Officer referred to the Secretary of State's policy in Annex K of the Immigration Directorate Instructions, as amended on 5 January 2015. The ECO accepted that the sponsor was present and settled in the United Kingdom, that the appellant was a minor at the time the sponsor was discharged from the armed forces and that an application would have been made for settlement before 2009 had the sponsor had the option available to him.
5. The respondent also refused the application under paragraph 320(8A) of the Rules because the appellant failed to present a valid medical certificate confirming that he had been screened for active pulmonary tuberculosis and was free of the disease. In addition, it was not accepted that the appellant was financially or emotionally dependent upon the sponsor, that he was aged 30 or under on the date of the application or that the appellant had lived apart from the sponsor for less than two years as required by Annex K and there were no exceptional compassionate circumstances. Reference was made to Article 8 ECHR, *Gurung & Ors* [2013] EWCA Civ 8 and *Ghising and others* [2013] UKUT 00567, however the respondent was satisfied that the reasons for refusal outweighed the consideration of historical injustice.
6. The appellant appealed that decision, enclosing documents including remittance receipts dating from 2017.
7. An Entry Clearance Manager (ECM) reviewed the decision on 12 February 2009 and noted that the appellant had still not provided a TB certificate nor any new documents. Considering the issues raised in the grounds, the ECM stated that the only evidence of emotional support was from 2017 and made 5 weeks prior to the application. The ECM considered that given the period of separation of over 7 years, it was reasonable that there be some tangible evidence of communication and was satisfied that emotional dependency had not been established. Regarding financial support, the ECM noted that evidence of this was dated from 2017 rather than throughout the sponsor's 7-year absence and consequently he was not satisfied that financial dependency had been established.
8. The ECM did not accept that Article 8 was engaged because the appellant is an adult who had spent all his life in Nepal, he did not qualify under the Rules and no exceptional circumstances had been demonstrated.

The hearing before the First-tier Tribunal

9. At the hearing before the First-tier Tribunal, it was conceded that the appellant could not meet the requirements of the Immigration Rules. The judge accepted that the appellant and sponsor enjoyed limited family life but found the refusal of entry clearance proportionate because the appellant was not financially dependent upon the sponsor, that the parties were not in frequent communication as claimed and that the sponsor and his wife were responsible for the separation by choosing to come to the United Kingdom and leaving the appellant in Nepal.

The grounds of appeal

10. The grounds of appeal argued that the judge failed to consider material evidence in the form of money transfer receipts and call logs predating the decision in question. Secondly, it was said that the judge's proportionality assessment did not include a proper assessment of the effect of the historical injustice or identify matters over and above the public interest in maintaining a firm immigration policy, *Ghising* at [32] and, furthermore, the judge had misconstrued the dicta of the Court of Appeal in *Gurung* at [42].
11. Permission to appeal was granted on the basis sought.
12. The respondent filed no Rule 24 response.

The hearing

13. Ms Jaja submitted that the second ground was the stronger. The following is a summary of the points she made. The judge was categorical about the first *Razgar* question. There was no issue with his Section 117 findings. At [10] of the decision the judge quoted *Ghising* and showed that he was aware of the correct legal principles but failed to apply them. Reliance was placed on *Ghising* from [59] onwards. The decision letter had accepted that an application would have been made for the sponsor to enter the United Kingdom before 2009 had the option been available. The sponsor's evidence was that he would have settled in the UK much earlier. Every box of *Ghising* was ticked and if the judge had applied the judgment, he would have reached a decision on proportionality in the appellant's favour. Regarding the first ground, Ms Jaja argued that the judge failed to correctly note the telephone records and remittance receipts and assess them, which led to him not considering material evidence.
14. Mr Walker stated that the first ground was made out regarding the records of the remittances. As for the second ground, he further conceded that there had not been a proper assessment of the circumstances of the appellant.
15. Given Mr Walker's concessions on both grounds, I indicated my acceptance that the decision of the First-tier Tribunal displayed a material error of law.
16. I was invited to immediately remake the decision by Ms Jaja. She added that the judge made clear findings on family life and urged me to remake the decision on

proportionality, adopting those findings. She wished to call no evidence nor make further submissions. Mr Walker also wished to add nothing.

17. At the end of the hearing I reserved my decision on the remaking.

Decision on error of law

18. Addressing the criticism of the judge's treatment of the historic injustice issue, it was apparent that the judge had regard to the terms of respondent's the policy in Annex K, the relevant case law which is reproduced at [32] of his decision and he noted at [40] that this issue was a relevant factor to the question of proportionality. Nonetheless at [44], the judge decided that the separation of the family unit was solely a consequence of the sponsor deciding to settle in the United Kingdom rather than historical injustice. As conceded by Mr Walker, the judge's proportionality assessment did not include a proper assessment of the effect of the historical injustice.

Remaking

19. In remaking this appeal, I have taken into consideration all the evidence before me, including that contained in the appellant's addendum bundle of evidence sent under cover of a letter dated 23 August 2019.
20. It is common ground that the appellant did not meet the requirements of the Immigration Rules at the date of decision and did not fall within applicable Home Office policy on adult dependants of ex-Ghurkha soldiers found in Annex K.
21. I have considered what was said in *Gurung*, at [45]: "*Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case.*" The relevant question, namely whether there existed a degree of dependency over and above that which would be expected in a normal family. While I accept that the appellant has been at least partially financially supported by the sponsor and that there is telephone contact, I do not consider this to be evidence of a level of dependency beyond what could be expected in a normal loving family. However, even were I to adopt the finding of the previous judge that there was "limited" family life between the appellant and the sponsor and find that Article 8 ECHR is engaged, I would dismiss this appeal for the following reasons.
22. The appellant was unable to meet several of the mandatory requirements in Annex K as correctly noted in the decision letter and has yet to provide a TB certificate.
23. To support the claim of dependency the sponsor states that when he and his wife visit Nepal, they only visit the appellant, despite several of the appellant's siblings living there. Indeed, the evidence of the sponsor was that one of the appellant's sisters is responsible for distributing the sponsor's pension among all the siblings remaining in Nepal. The sponsor worries that the appellant, who he says has never worked nor studied beyond school level, will never be independent in Nepal. The appellant is described as having no medical problems and the evidence does not display any compelling or exceptional circumstances.

24. Considering the issue of proportionality, I am required to have regard to the matters set out in section 117B of the 2002 Act, as amended. Those matters being that the maintenance of effective immigration control is in the public interest. In this case, the appellant does not speak English and he is not independent, albeit he is currently financially supported to some extent by the sponsor.
25. I acknowledge the issue of historic injustice and have considered the findings in *Ghising*. In particular, I accept that the fact that an adult child has been prevented from following their parents due to an historic injustice is a relevant factor in the proportionality exercise. I would note that the appellant in this case is not in the same position as the claimant in that case. He is a decade older, has not lived with the sponsor for nearly 9 years, there is a gap of at least 5 years in the evidence of financial dependency, he has close relatives still living in Nepal and the sponsor has other children in the United Kingdom to assist him. I am also bound by what was said in *Pun* [2017] EWCA Civ 2016;
20. *The critical feature for the right to rely on the historic injustice is dependency. ..Both the FTT and the Upper Tribunal...have found that there is no dependency and that, to our mind, prevents the historic injustice from having the same considerable weight it must have for adults dependent on their parents at the time when the application is made."*
26. It is argued that the appellant is emotionally and financially dependent on the sponsor. I find that the documentary evidence of that dependency to be sparse, particularly during the years immediately after the sponsor left Nepal for the United Kingdom. The evidence of financial support was evidenced by one money transfer receipt for 2016, seven for 2017 and monthly remittances for 2018. While, the sponsor claimed that he had given cash to friends and family for the appellant, no evidence to support this has been provided at any stage.
27. The point made by the respondent stands; that being there was no documentary evidence of the appellant being financially supported by the sponsor until approximately a year prior to the application for entry clearance being made. As for the evidence of emotional support, the call logs date from 30 November 2017 onwards. I have taken into consideration the indication that telephone contact continued after the application and continues to date, however there is no documentary evidence of telephone contact until shortly before the application for entry clearance was made, as the respondent states in the decision. In essence, there is an absence of continuing emotional and financial dependency during a five-year period following the sponsor arriving in the United Kingdom in 2010. While the respondent accepted that the sponsor would have settled in the United Kingdom earlier were it not for the historic injustice, it is the case that the sponsor left the Gurkha Regiment in 1969, whereas the appellant was not born until 1983 and thus he would not have been able to accompany his father. Given the foregoing findings, I have limited the weight which I have attached to the historic injustice issue. I conclude that considering all matters, including the appellant's limited emotional and financial dependency on the sponsor, that his circumstances are insufficiently compelling to outweigh the public interest considerations applicable in this case.

28. In conclusion, the respondent's decision to refuse the appellant entry clearance was not disproportionate given the circumstances.
29. For the above reasons:

The First-tier Tribunal judge materially erred in law and his decision is set aside.

The decision I re-make is to dismiss the claimant's appeal.

No anonymity direction is made.

Signed

Date 06 September 2019

Upper Tribunal Judge Kamara