



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25006/2018

THE IMMIGRATION ACTS

Heard at Field House
by Skype for Business
On 6 May 2021

Decision & Reason Promulgated
On 26th May 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**PREM KUMAR THAPA MAGAR
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Matthew Moriarty of Counsel, instructed by Everest Law
Solicitors

For the respondent: Ms Susana Cunha, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 15 November 2018 to refuse him entry clearance to join his father and step-mother in the United Kingdom. The appellant is a citizen of Nepal, an adult son of a former Gurkha who settled in the United Kingdom, with the appellant's step-mother, in 2014.

2. **Mode of hearing.** The hearing today took place remotely by Skype for Business. There were no technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.
3. The appellant is aged 47. He accepts that he cannot bring himself within Annex K. he relies on his family life under Article 8 ECHR.
4. On the respondent's behalf, Ms Cunha accepted at the hearing that financial dependency had been demonstrated but argued that the evidence of emotional dependency was not sufficient. However, she accepted that if family life were found, and Article 8(1) engaged, then having regard to the historic injustice to former Gurkha soldiers and their families, such a finding would be determinative of the appeal in favour of the appellant.
5. The First-tier Judge found the appellant's father and step-mother to be unreliable witnesses, whose accounts changed several times and were contradictory. However, it was common ground, having looked at the decision of the First-tier Tribunal and the documents which were before the First-tier Judge, that he failed to engage with a very significant number of documents, the parents' passports showing at least two long visits by the appellant's father and step-mother to Nepal, in 2017 and 2019, and bank statements and other financial evidence of very substantial payments to him made during those visits. There were also numerous telephone cards and Viber conversations.
6. I am satisfied that the First-tier Judge made an error of fact at the level of an error of law in overlooking that evidence, and also that in applying the negative view he had formed of the parents' evidence to the documentary evidence which he did consider, he committed the *Mibanga* error. There was no question but that the decision would have to be set aside and remade.
7. I therefore proceeded to remake the decision at the hearing. The core account is that the appellant's parents (that is to say, his father and his second wife, the appellant's step-mother) moved to the United Kingdom in 2014. Before leaving, they set up the appellant with a general store and left him in a large home, hoping that he would make himself independent.
8. The evidence of both parents was that the appellant had never worked. He does have two uncles locally, who are farmers, and two sisters in Nepal. The appellant has produced a certificate that he is single, and another certificate that he is unemployed, neither of which is challenged in the refusal decision and on which his parents were not cross-examined in the First-tier Tribunal. Those documents must be regarded as reliable.
9. The general shop failed. In 2017, when the appellant's parents came to visit, they gave him over £23000, partly to pay off the debts the shop had incurred, and partly to support him in the future. The appellant also had access to his father's Nepalese Gurkha pension account. The telephone cards and Viber messages indicate

substantial contact between the parents and the appellant in Nepal, and again, they were not cross-examined on those documents in the First-tier Tribunal.

10. The test of dependency in a historical injustice case is set out in *Patel, Modha & Odedra v Entry Clearance Officer (Mumbai)* [2010] EWCA Civ 17 (25 January 2010) at [14] in the judgment of Lord Justice Sedley (with whom Lord Justice Longmore and Lord Justice Aikens agreed):

“14. You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right. That is what gives the historical wrong a potential relevance to art. 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art. 8(2).”

11. In *Ghising (family life – adults – Gurkha policy) Nepal* [2012] UKUT 160 (IAC) (11 April 2012, the Upper Tribunal held that the Article 8(1) issue is highly fact-sensitive:

“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). As Wall LJ explained, in the context of family life between adult siblings:

“We do not think that *Advic* is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life it is sought to establish is that between adult siblings living together. In our judgment, the recognition in *Advic* that, whilst some generalisations are possible, each case is fact-sensitive places an obligation on both Adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Article 8 is or is not engaged in a given case.” (*Senthuran v Secretary of State for the Home Department* [2004] EWCA Civ 950).“

12. The relevant factual matrix here is that the appellant lived with his parents (first his father and his mother, and later his father and his step-mother) all of the time they lived in Nepal, and that since then, they have provided for him and been in regular telephone contact with him, as well as two long visits to sort out his finances and reconnect with him and, no doubt, the extended family of his siblings and uncles. He lives in a large house with spare bedrooms which are unused, except during those visits. He relies on his father’s Gurkha pension, and large sums of money which his father gives him when he visits.

13. The respondent does not dispute financial dependence, and there is sufficient evidence of emotional dependence also in the documents before the Tribunal. The appellant and his father and step-mother remain a close knit family, despite the distance. He does not work and is a single man.
14. I am satisfied that Article 8 (1) is engaged. By reason of the concession made by Ms Cunha that if Article 8(1) was engaged, the appellant's claim should succeed, I need go no further than that.
15. The decision of the First-tier Tribunal is set aside and the appellant's appeal against the refusal of entry clearance allowed.

DECISION

16. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by allowing the appellant's appeal.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 7 May 2021