



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05825/2020

THE IMMIGRATION ACTS

Heard at Field House

On 5 May 2022

**Decision & Reasons
Promulgated
On 26 May 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**MR SARBAJIT RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jafar, Counsel instructed by way of Direct Access
For the Respondent: Mr Walker, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Nepal born on 2 December 1987. On 23 September 2019, he applied for entry clearance to join his mother in the United Kingdom as an adult dependant of a former Ghurkha soldier. That application was refused on 25 November 2019. On 28 April 2021, First-tier

Tribunal Judge Ford dismissed his appeal against that decision. Permission to appeal was granted on 10 June 2021 by First-tier Tribunal Judge Easterman and at a hearing on 25 February 2022 Mr Tufan for the respondent conceded that the judge had made various material errors of law in line with the grant of permission, including taking into account immaterial considerations, making speculative findings against the weight of the evidence and failing to put negative points to the appellant's which resulted in procedural unfairness.

2. On this basis a panel of the Upper Tribunal was satisfied that the decision involved the making of a material error of law and should be set aside in its entirety with no findings preserved. The error of law decision is attached at Annex A. The hearing was adjourned for remaking by the Upper Tribunal in order for the appellant's mother to give further evidence (an interpreter had not been booked for the error of law hearing and the appellant had not served the appropriate Rule 15(2)(a) notices).
3. The remaking hearing took place before me on 5 May 2022. The respondent was represented by Mr Walker and the appellant again by Mr Jafar.

Documents and Evidence

4. The appellant submitted further evidence in respect of his relationship and dependency on his mother, including a further witness statement, confirmation of his current employment status from his local authority in Nepal, bank statements demonstrating that he withdraws cash from the bank account into which the army pension is deposited in Nepal and evidence of regular communication between the appellant and his mother.
5. Having had regard to the Rule 15(2)(a) notices, I was satisfied that it is fair and in the interests of justice to admit this evidence which addresses the concerns that the judge did not put to the witness in the previous hearing and is recent evidence of continued dependency which post-dated the original hearing. Mr Walker did not object to the evidence being admitted.

Agreed facts

6. The parties agree on the following facts:
 - (1) The appellant's father was a former Ghurkha soldier who served between 1961 until 1977. He was discharged with exemplary service. He died in 2013;
 - (2) The appellant is the son of a former Ghurkha soldier;
 - (3) The appellant applied for leave to enter the United Kingdom in 2019, together with his mother who applied as the widow of a former Ghurkha soldier. She was granted leave to enter under the discretionary arrangements in place for widows of Ghurkha soldier discharged before 1 July 1997.

- (4) The appellant has three siblings, two of whom live in Hong Kong with their children. They have the status of British overseas nationals because they were born in Hong Kong. They work as unskilled labourers. The appellant is the youngest child of the family;
- (5) The appellant is single and has no children.
7. It was agreed between the parties that the main issue in this appeal is whether family life pursuant to Article 8 ECHR exists between the appellant and his mother in the UK. The relevant test is whether there exists “real or effective or committed support” between the appellant and his mother. The second issue is whether the appellant’s father would have relocated to the United Kingdom but for the historic justice.

Respondent’s concession

8. Mr Walker for the respondent helpfully indicated that should the Tribunal find that family life pursuant to Article 8 ECHR is engaged between the appellant and his mother, the denial of entry would be disproportionate further to the principles set out in Gurung and Others R on the application of v Secretary of State for the Home Department [2013] ECWA Civ 8.
9. I remind myself of what historic justice actually means in relation to former Ghurkha soldiers. At [2] of Gurung the Court of Appeal stated:

“(For many years Ghurkha veterans were treated less favourably than other comparable non-British commonwealth soldiers serving in the British Army. Although commonwealth citizens were subject to immigration control, the SSHD had a concessionary policy outside the Rules which allowed such citizens who were serving and former members of the British Armed Forces to obtain on their discharge indefinite leave to enter and remain in the United Kingdom. Ghurkhas were not included in this policy. They were therefore not entitled to settle in the United Kingdom).”
10. The Court of Appeal went on at [42] to explain that the injustice was capable of having been suffered not only by the veteran soldier but also by his family members;

“If a Ghurkha can show that but for the historic injustice he would have settled in the UK at a time when his dependent now adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now”.
11. The evidence of the appellant and sponsor before the Tribunal was that the appellant’s father often served abroad. During his course of his work for the British Services, he was deployed with his family to various different countries, including Hong Kong where his two older sons were born in 1971 and 1972. After the appellant’s father was discharged from the army the family returned to their home village in Nepal where the third and fourth children were born. The third brother joined the Indian Army in 1995 and

was discharged in 2012 and then went to work as a security officer in Afghanistan, where he worked from 2013 to 2021. His contract was terminated when the US and British Security Forces left. He is now settled in Kathmandu with two daughters and his main source of income is his army pension.

12. The appellant is the youngest son of his parents. He was born in Nerpa Gairi Gauan village, Nepal after his father's retirement. This is his ancestral village and home. He grew up with his father, mother and siblings. He has always lived in this home with his mother until she relocated to the United Kingdom after her successful application in 2019. His father died in 2013. The appellant continues to live in Diktel district which is a remote area in the eastern part of Nepal where there is no way to find work. The appellant stopped going to school when he was young because he lost a finger on his left hand which embarrassed him as he was the subject of bullying. The school was one and a half hours' walk away and he is not well educated. He has not been able to find employment. He lives at the family home and is entirely dependent on the father's army pension to survive. His mother also sometimes sends remittances to the United Kingdom. The appellant speaks to his mother regularly on the phone and they offer emotional support to each other. They are very close to each other in accordance with their culture.
13. Further supporting documentary evidence included evidence from the chairman of the Diktel Rupakot Majhuwagadhi municipality confirming that the appellant was born in that district, previously lived with his father and mother, continued to live with his mother after the death of his father and is currently jobless. The appellant also provided more evidence of his father's service in the army, his father's army pension being paid into a savings account in his mother's name and withdrawals being made on a regular basis from that account in Nepal. There was also previous evidence of money remittances, as well as evidence of frequent calls between the appellant and the sponsor.
14. The appellant's mother gave evidence that had Ghurkha soldiers been permitted to relocate to the United Kingdom after discharge from the army, she and her husband would have elected to do so and that their older children would have accompanied them. In these circumstances the appellant would have been born in the United Kingdom and permitted to settle in the UK.
15. The appellant's mother gave a plausible explanation for why the applications were not made earlier in that when the policy initially changed in 2009 their son was over 18 and they were unwilling to leave him behind in Nepal. By the time the policy changed again to permit the appellant to make an application, the appellant's father had died and there was a delay in obtaining funds to make the applications.
16. I am entirely satisfied on the evidence before me that the appellant's father would have applied to come to the UK at the end of his service had

he been able to do so. This is consistent with his length of service, the fact that the family travelled abroad during the service and with the application made by the appellant and his mother to reside in the UK.

17. Mr Walker for the respondent further conceded that, having had sight of the new supporting evidence together with the previous evidence, the respondent now accepts that family life exists between the appellant and his mother. The respondent accepts that the appellant has lived with his parents all his life, is single, has no family of his own and is financially supported by his mother. It is also accepted that there are strong emotional ties between them. It is accepted that there is dependency between the sponsor which amounts to “real, committed or effective support”. In my view the evidence supports this concession.
18. I therefore find that the appellant enjoys family life with his mother. The refusal to permit the appellant to join his mother in the United Kingdom is an interference with sufficiently serious consequences to engage Article 8(1) ECHR.
19. The refusal is in accordance with the law as expressed in Annex K and in the immigration rules and necessary for the public interest, namely the maintenance of effective immigration control.

The Proportionality Assessment

20. The assessment requires a balancing of the extent of the interference with the rights of the appellant against the public interest. In assessing the public interest the only factor identified by the respondent is the need to maintain effective immigration control. I find in accordance with Gurung that the historic injustice outweighs the public interest in a firm immigration policy and therefore conclude in line with the respondent’s concession that the decision to deny entry is a disproportionate interference with the right to respect for the appellant’s family life and unlawful under Section 6 of the Human Rights Act 1999.

Decision and Remaking

21. The appeal is remade and allowed under Article 8 ECHR.
22. No anonymity direction is made.

Signed R J Owens

Date 16 May 2022

Upper Tribunal Judge Owens

Appendix A



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/05825/2020

THE IMMIGRATION ACTS

**Heard at Field House
By Microsoft Teams
On 25 February 2022**

**Decision & Reasons
Promulgated**

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Before

**UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE SAINI**

Between

**SABBAJIT RAI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Jafar, Counsel instructed by way of Direct Access
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

**DECISION MADE PURSUANT TO RULE 40(3) OF THE
TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Ford sent on 28 April 2021 dismissing his appeal against

the decision dated 25 November 2019 refusing him leave to enter as the adult child of a former Gurkha soldier.

2. The hearing was held remotely by Microsoft Teams. We were satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. The parties confirmed that they could see and hear each other and there were no problems with connectivity. Neither party complained of any unfairness.
3. The judge found that the appellant does not have family life with his mother the sponsor who is herself the widow of a former Gurkha soldier and dismissed the appeal.
4. At the outset of the error of law hearing, Mr Tufan for the respondent conceded that the judge had made a material error of law in line with the grant of permission.
5. We are in agreement. In this appeal the judge took into account immaterial considerations by finding that this was an unusual case because there was a pattern of migration in the family. It is not clear what relevance this has to the relationship between the sponsor and appellant. The judge's finding that the sponsor was living abroad was against the weight of the evidence which pointed to her living in the family home in Nepal with the appellant prior to coming to the UK. The reasons given by the judge for finding that the sponsor lived abroad were inadequate and speculative. Further these points were not put to the sponsor which resulted in procedural unfairness. Had the judge not made these errors, she may have formed a different view as to whether family life existed between the sponsor and the appellant.
6. We are satisfied that the respondent's concession is appropriate. The decision involved the making of a material error of law and should be set aside in its entirety with no findings preserved.
7. Rule 40 (3) provides that the Upper Tribunal must provide written reasons for its decision with a decision notice unless the parties have consented to the Upper Tribunal not giving written reasons. We are satisfied that the parties have given such consent at the hearing, but we have summarised our reasons for the benefit of the parties.

Notice of Decision

8. The decision of the First-tier Tribunal involved the making of an error of law.
9. The decision of the First-tier Tribunal is set aside in its entirety.
10. The decision is adjourned for re-making at the Upper Tribunal.

Directions

- a) This appeal is to be listed for remote oral hearing on the first available date before UTJ Owens for a 2-hour slot.
- b) A Nepalese interpreter is required.
- c) The appellant is, no later than 7 days after the date of receipt of this notice, to provide the relevant rule 15(2A) Notices in respect of the additional evidence.

Signed

Date: 28 February 2022

R J Owens
Upper Tribunal Judge Owens