Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/10176/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
by UK Court Skype	
On 14 January 2022	**On 31 January 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

ENTRY CLEARANCE OFFICER

Appellant

And

MR YOK BAHADUR THAPA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant Ms Alexandra, Senior Home Office Presenting Officer
For the Respondent: Mr Jesurum, Counsel instructed by Everest Law Solicitors

DECISION AND REASONS

1. The Entry Clearance Officer appeals against the decision of First-tier Tribunal Judge I Ross sent on 27 May 2021 allowing Mr Thapa’s appeal against a decision dated 12 March 2021 refusing him entry clearance to the United Kingdom as adult dependent child of a former Gurkha soldier. Permission to appeal was granted by First-tier Tribunal Judge O’Brien on 2 July 2021 on the basis that it was arguable that the judge had erred in finding that there had been historic injustice or gave weight to historic injustice when this was not open to him.

© CROWN COPYRIGHT 2022

2. The hearing was held remotely and neither party objected to the manner of the hearing. Both parties participated by Microsoft Teams. I am satisfied that a face-to-face hearing could not be held because it was not practicable because of the current Covid- 19 restrictions and that all of the issues could be determined in a remote hearing. Neither representative complained of any unfairness during the hearing and there were no connectivity problems.

Background

3. Mr Thapa’s father and sponsor served in the Brigade of Gurkhas for over 22 years. He was promoted from the ranks to earn a commission. He was discharged with an exemplary record of conduct on 1 April 1995. Mr Thapa’s grandfather was also in the Brigade of Gurkhas and was awarded the Victoria Cross and his brothers also served. Mr Thapa’s father was issued settlement entry clearance on 27 October 2006 as a former Gurkha soldier and his mother on 29 March 2007 as a dependent of his father. Mr Thapa applied for settlement on 26 February 2019 to join his parents in the UK as the adult dependent of a former Gurkha soldier.

4. The application was refused on 8 May 2019 and the refusal was upheld on review by the Entry Clearance Manager on 16 December 2019. The basis of refusal was that Mr Thapa did not meet the discretionary policy for Gurkha soldiers inter alia, because he was over the age of 18, had lived apart from his parents, he was no longer dependent on them and had formed an independent family unit. Further it was said that at the date of discharge Mr Thapa was over 18 as he was 19 years and 1 month old. In the view of the Entry Clearance Officer there was no breach of Article 8 ECHR because family life no longer existed between Mr Thapa and his sponsor.

Decision of the First-tier Tribunal

5. The judge heard oral evidence from the sponsor. The judge found the sponsor was an honest and credible witness and that, had there been a policy in place earlier for Gurkhas to settle in the UK, he would more likely than not that have exercised his right to settle in the UK resulting in the appellant either being born in the UK or being able to come here with his parents when he was still a child. The judge found that there was real, effective and committed support between Mr Thapa and his parents and that this amounted to family life. The judge then went onto consider the issue of proportionality and found that the historic injustice tipped the balance of proportionality into Mr Thapa’s favour. He allowed the appeal under Article 8 ECHR.

The Grounds of Appeal

Ground 1 – Failure to take into account relevant factors in proportionality assessment

6. It is asserted that the judge erred in failing to make a complete proportionality assessment and should have taken other factors into consideration such as maintenance and accommodation. For instance, the judge failed to give consideration to where the appellant, his wife and two children will live in the UK, that they do not have language skills and how they will afford to live in the UK. It is asserted that the existence of the historic injustice is not determinative.

Permission

7. Permission was granted by First-tier Tribunal Judge O'Brien on the basis that the judge's assessment of proportionality was perfunctory and because the judge arguably erred in "finding that historic injustice was suffered and or gave it weight not open to the judge".

Rule 24 response

8. This was amplified in oral submissions and forms part of my analysis below. In summary, Mr Jesurum submits that, having found that Mr Thapa would have settled in the UK but for the historic injustice and having found that Mr Thapa has family life with his sponsors, the judge has correctly directed himself in relation to proportionality given the guidance in R (Gurung) v SSHD [2013] 1 WLR 2546. It is submitted that the grounds do no more than amount to a disagreement with the judge and the weight that he has given to the historic injustice.

Discussion and Analysis

Initial observations

Family life

9. There is no challenge in the grounds of appeal to the judge's factual finding that family life exists between Mr Thapa and the sponsor and that Article 8(1) ECHR is engaged.

The grant of permission

10. The grant of permission is on a ground not advanced by the Entry Clearance Officer. It was not originally asserted in the decision under appeal either by the Entry Clearance Officer or by the Entry Clearance Manager that this was a case in which there had been no historic injustice. The judge found that had Gurkha soldiers been permitted to settle in the UK, the sponsor would have taken the opportunity to settle in the UK earlier and that Mr Thapa would have either been born in the UK or would have come to the UK as a child. There is no challenge by the Entry Clearance Officer to this finding.

11. However, despite this finding, the permission judge observes that Mr Thapa was over 18 when his father was discharged and that the judge arguably erred in finding that historic injustice was suffered.

12. The grant of permission does not identify why this was granted in the absence of an express ground of appeal. The judge may grant permission on a "Robinson obvious" point, but in accordance with AZ (error of law - jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC), permission should only be granted on this basis if the ground has a strong prospect of success or if it relates to a matter of general importance. The judge has identified neither factor here. Extensive litigation has settled the principles which apply in Gurkha cases and there was little prospect of success in circumstances where the judge had made a clear unchallenged finding that the sponsor would have settled in the UK much earlier and that Mr Thapa would have been born in the UK but for the failure of the British government to allow Gurkha soldiers to settle.

13. I am not satisfied that this ground is made out. The unchallenged evidence before the judge was that Mr Thapa's father would have left the army and applied to come to the UK prior to the birth of his son if this option had been open to him. The fact that he could not apply until 2004 is precisely the 'historic injustice' identified in the Gurkha cases. He had joined the Brigade of Gurkhas in 1972. The witness was of good character. He was discharged with an exemplary record of conduct and was described by his commanding officer as "extremely honest and trustworthy". The judge found him to be an honest and credible witness at [17] and it was manifestly open to him to do so.

14. At [15] the judge states;

> "Had it not been for the historic injustice, I find that the appellant's father would more likely than not have exercised his right to settled in the UK resulting in the appellant either being born in the UK or being able to come here with his parents when he was still a child. That is a factor which must weigh heavily in the proportionality exercise".

15. The sponsor's evidence was set out in his witness statement at 2. He stated;

> "I was married during my Army service and all three of my children were born during my service in the British army. At that time retired Gurkhas were not given rights of settlement in the UK. Had I been told that I would have been given rights of settlement in the UK with my minor children, I would have left the British Army voluntarily and come to the UK for my second career. I would not have wanted to return to Nepal where I did not have much life. I had spent my entire career outside Nepal. There is no doubt in my mind that had such an opportunity been available, I would have taken it and come to the UK with my wife and children".

16. The witness goes on to describe how he took his wife and children with him abroad when he could, how he was not allowed to bring them when he worked in the UK and the difficult circumstances in which his family were living in Nepal.

17. I am satisfied that the judge took into account the evidence before him, that it was open to him to accept that the sponsor was credible and

moreover open to him to find that ‘but for’ the historic injustice Mr Thapa would have been born in the UK or come to the UK as a child. This finding was entirely rational and grounded in the evidence. On this basis, I am satisfied that this ground as set out in the grant of permission is not made out. I am satisfied that the judge was entitled to find that there had been historic injustice.

18. Mr Everett for the Entry Clearance Officer did not seek to persuade me otherwise.

Ground 1 – Failure to take into account relevant factors in the assessment of proportionality

19. My first observation, with which Ms Everett agreed is that the grounds are poorly drafted. The grounds assert that the judge failed to take into account where Mr Thapa and his wife and children would live and how they would afford to survive in the UK. This assertion is entirely misconceived as Mr Thapa made his application on an individual basis and is not travelling to the UK with his wife and children. The judge manifestly did not fail to take into account these factors as they were not relevant. This ground is not made out.

20. Mrs Everett for the respondent did not make any further submissions beyond what was stated in the grounds of appeal.

21. I am satisfied that Ground 1 amounts to an assertion that the judge gave too much weight to the ‘historic injustice’ and failed to take into account other relevant considerations in 117B of the Nationality, Immigration and Asylum Act 2002.

22. It is trite law that it is a matter for a judge what weight he gives to various factors.

23. Secondly, I am satisfied that the judge directed himself appropriately. Veterans of the Brigade of Gurkhas were denied any opportunity to apply for settlement until 2004. This was found to be a historic injustice in R (Limbu) [2008] EWHC 2261 and confirmed in R (Gurung).

24. The relevance of that historic injustice is set out in R (Gurung). If a Gurkha can show that but for the historic injustice he would have settled in the United Kingdom 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.

25. Where a historic injustice is causative of the delay in an application for status that an appellant would have but for that injustice, the balance of proportionality is reversed Patel v ECO (Mumbai) [2010] EWCA Civ 17. The starting point is that those denied entry earlier should be put in the position they would have been but for that wrong.

26. This approach was approved by the Court of Appeal in R (Gurung). Lord Dyson held at [41];

> "The crucial point is that there was an historic injustice in both cases, the consequences of which was that members of both groups were prevented from settling in the UK. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Gurkha who is settled in the UK has such a strong claim to have his Article 8(1) right vindicated notwithstanding the potency of the countervailing pubic interest in the maintaining of a firm immigration policy".

27. The guidance in Ghising [2013] UKUT 567 (IAC) is very clear the historic injustice will normally require a decision in the appellant's favour unless the Entry Clearance Officer relies on something more than the ordinary interests of immigration control.

28. In my view the judge was correct to give the historic injustice significant weight at [15] and [21]. The grounds do not identify any factors apart from the interests of immigration control which would outweigh this. The judge's decision may be brief but it is lawful.

Conclusion

29. It follows that none of the Entry Clearance Officer's grounds of appeal are made out and the Entry Clearance Officer's appeal is dismissed.

Decision

30. The decision of the First-tier Tribunal allowing the appeal is upheld.

31. The decision is upheld.

Signed R J Owens Date 20 January 2021

Upper Tribunal Judge Owens