



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03288/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 December 2017 and 30 July 2018

Decision and Reason Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

**TRISA GURUNG
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Jaisri (Counsel) (both hearings)
For the Respondent: Ms A Fujiwala (Specialist Appeals Team; December 2017)
Ms A Everett (Specialist Appeals Team; July 2018)

DECISION AND REASONS

1. This is the appeal of Trisa Gurung, a citizen of Nepal born 3 March 1982, against the decision of the First-tier Tribunal dismissing her appeal against the entry clearance officer's refusal of her human rights claim, dated 21 January 2016.
2. Ms Gurung applied for entry clearance as the dependent daughter of As Bahadur Gurung, a former soldier in the Brigade of Gurkhas. Her father arrived in the United Kingdom on 17 June 2010 with his wife, Alti Siri Gurung.

3. The application was refused by decision letter of 21 January 2016, essentially because the daughter had applied some six years after her parents had travelled to settle in the United Kingdom, which had effectively ended their life together as a family, notwithstanding that the parents had visited her on several occasions since then. There was no evidence of dependency in recent years between the daughter and her parents; the latter had chosen to come to the United Kingdom notwithstanding that she was ostensibly still at school then. She was in good health and could be expected to work in Nepal; she had at least one other sibling still in the country.
4. There was limited evidence of contact between the Appellant and her parents. Accordingly she did not meet the requirements of the dependent children policy for Gurkhas, and nor did she meet the very high requirements for settlement as an adult dependent relative that generally prevailed under the Rules. The historic injustice suffered by the Gurkhas and the delay in implementing appropriate settlement arrangements for them did not operate such as to make good the absence of close family life and dependency in recent years.
5. The Appellant lodged an appeal to the First-tier Tribunal. The Entry Clearance Manager upheld the Respondent's decision having seen the grounds of appeal.
6. The First-tier Tribunal heard evidence from the Sponsor, who stated that he and his wife spoke daily to their daughter. He and his wife had health problems: his wife suffered from intestinal problems whilst he experienced high blood pressure and problems with his urinal tract. The Appellant had remained in education because of the need to raise funds for her schooling and as she had started school late. He had been solely responsible for her maintenance, and she had not worked; unemployment was high in Nepal so there was no alternative. She planned to study for a doctorate.
7. The First-tier Tribunal dismissed the appeal on 28 July 2017, on the basis that neither the Immigration Rules nor the Home Office Guidance was met: together they comprised a set of norms which would render decision making under them compliant with human rights standards save in "exceptional", or "compassionate and compelling" circumstances. There were none here: the matter of historic injustice had already been addressed under the Guidance, there was no medical evidence to support the parents' claimed inability to visit Nepal (indeed they had in fact visited in 2017), and any family life between the Appellant and Sponsors could not amount to exceptional circumstances. However, the First-tier Tribunal was not satisfied that there was family life prevailing between the family in the UK and in Nepal: the Appellant had moved out of the family home into rented accommodation when her parents moved to the United Kingdom, and had lived alone for the last seven years, independently from them. The parents had voluntarily chosen to leave their daughter behind.
8. Grounds of appeal alleged that the First-tier Tribunal had failed to engage with the critical aspect of the case, which was that the Appellant remained unmarried, in

education and dependent upon her parents; the overriding consideration was whether the interference with Article 8 rights was proportionate, rather than exceptional. The Home Office published guidance required that a proportionality assessed be carried out, even where an application fell to be refused under the policy itself. The Court of Appeal in *Rai* had made it clear that a decision maker should concentrate upon whether family life endured notwithstanding parental migration rather than fixating on any perceived “choice” that the family should live apart. The crucial factors were whether the family unit would have applied to settle in the United Kingdom together at the time of the parental migration had that been an option, and whether a child left behind had subsequently formed an independent family unit. Were that established, then it would require strong reasons to find their exclusion proportionate.

9. Although the First-tier Tribunal originally refused permission to appeal, Judge Grubb granted permission on 9 October 2017.

Findings and reasons following the error of law hearing

10. Before me the advocates were agreed that the grounds of appeal were essentially made out, in particular because
 - (1) The overriding test should have been the proportionality of the interference with Article 8 rights rather than its exceptionality;
 - (2) The First-tier Tribunal had consistently treated the parents’ decision to migrate to the United Kingdom as a choice that brought about the separation, rather than focussing on whether the family’s life together had been interrupted because of the consequences of the parents taking advantage of the necessary administrative measures put in place to rectify the historic injustice visited upon the Gurkha Brigade.
11. In these circumstances, my decision can be relatively brief. Having considered the matter with care, I agree that the decision of the First-tier Tribunal is flawed for those reasons.
12. This is a case where the First-tier Tribunal found that family life was not established between Appellant and Sponsors, and additionally that any interference with it was not disproportionate.
13. The courts have given guidance on assessing the existence of family life where the separation of the parties has been exacerbated by a “historic injustice”. In *Patel* [2010] EWCA Civ 17, Sedley LJ stated at [14] that “what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children ... 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”. In *Rai* [2017] EWCA Civ 320 at [36]-[37] Lindblom LJ found that the Upper Tribunal had erred in law in assessing the existence of family life by “looking not just for a sufficient degree of financial and emotional dependence to constitute family life, but also for some extraordinary, or exceptional, feature in the appellant’s dependence upon his

parents as a necessary determinant of the existence of his family life with them.” Lindblom LJ concluded that “Throughout his findings and conclusions with regard to article 8(1), the Upper Tribunal judge concentrated on the appellant's parents' decision to leave Nepal and settle in the United Kingdom, without, I think, focusing on the practical and financial realities entailed in that decision. This was, in my opinion, a mistaken approach.”

14. The Court of Appeal in *Rai* went on to conclude that an error of law in the assessment of family life would itself be likely to render any proportionality assessment unlawful. In any event, when evaluating proportionality, the approach of Sedley LJ in *Patel* at [15] is relevant here:

“... [The] effect of this is to reverse the usual balance of [article] 8 issues. By the time they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of [article] 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of [article] 8(1), the balance of factors determining proportionality for the purposes of [article] 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in *NH (India)*, the family would or might have settled here long ago.”

15. As this passage makes clear, the central question is proportionality rather than a search for exceptionality. The First-tier Tribunal erred by treating the Rules and Guidance as essentially determinative of the compatibility of the decision appealed against with the family life in play in the appeal. It remained necessary to assess all relevant circumstances, having regard to the starting point in *Patel* and the absence of any overt public interest factors counting against the application's success.
16. In the light of the analysis above, it was clear that the First-tier Tribunal decision was flawed by material errors of law. As only limited fact-finding remained, it was appropriate to retain the matter in the Upper Tribunal for final resolution.

Findings and reasons following the continuation hearing

Further evidence

17. It is now appropriate to set out evidence from the witness statement of Mr As Bahadur Gurung at greater length than was previously necessary. He stated that he was born 21 January 1939, and enlisted in the Brigade of Gurkhas on 13 November 1956 and served until March 1970, his military conduct having been described as exemplary; he was awarded the GSM with Clasp Malaya and Clasp Borneo. He was granted indefinite leave to enter on 19 May 2010 and arrived on 17 June 2010. His wife travelled with him. Their son Manbahadur was born in 1965, their daughter Tilkumari was born 25 September 1968 in Hong Kong, and their daughter Trisa was born 3 March 1982 in Syangja, Nepal. Manbahadur lived an independent life with his family. Tilkumari was married to a former Gurkha and they lived in the UK.

18. The Sponsor would have applied for his children to join him sooner, but the Rules did not cater for dependents under the age of 30 when he was granted Indefinite leave. Trisa could not subsequently be the subject of an application to join her parents because she was over the age of eighteen. They had never been apart for more than two years: they visited Trisa in 2012, 2013, 2015 and 2017, for periods of up to 3 months at a time. Trisa had studied in Nepal, as an adult, as was common in Nepal. Her ability to work professionally was significantly restricted there. She had lived with her parents between the age of 18 and 27. Manbahadur could not provide her with any support as he had his own family commitments; her emotional and financial support came from the Sponsors. There was a limited record of his payments to her as he had historically given her cash which she spent rather than deposited; since February 2017 they had set up banking arrangements to show the remittances.
19. The family had only separated because of the Sponsor's move to the UK. He had made temporary care arrangements for Trisa when he departed for the UK in June 2010, and left her cash to cover her expenses. The grant of entry clearance to her would render their family complete. It would be much more cost effective to support her in the UK than to remit funds to her in a separate household. She was fully dependent on them for expenses relating to her education, accommodation, health and transportation. His military pension in Nepal was equivalent to £315 monthly. He and his wife stayed with Trisa when they visited her in Nepal.
20. They wished to live with her as a family, given the responsibility that parents were perceived to have for their children until marriage in their culture. He and his wife's health was not as good as it used to be and they needed their daughter's practical assistance, just as she needed their emotional and financial support; she had helped them with cooking, cleaning, shopping and doctor's appointments before they travelled here. They had lost the chance to remain with her because of their inability to apply to settle in the UK until 2006; all of his children would have been under the age of 18 had this possibility been recognised sooner. They feared for her since the earthquake which had made conditions worse generally. She had nobody to turn to in Nepal.
21. Cross examined by Ms Everett, Mr Gurung stated his daughter was still not working. She had sought employment without success; her qualifications in village development had not proved useful. His son lived far away, in Pokhu. His daughter had no friends in Kathmandu.
22. Ms Everett submitted that there was no enduring family life, and that the decision was proportionate. Time had moved on significantly. The family's separation could be viewed as driven by legitimate choices as to how the family organised itself rather than having been driven by external circumstances.
23. For the Appellant Mr Jaisri submitted that the relevant considerations were as identified by the Court of Appeal in *Rai* – was there family life at the time of the Sponsor's departure? Had it been maintained? And was exclusion

disproportionate? It was his case that each of these questions should be answered affirmatively. The Sponsors had lived with the Appellant before coming to the UK. They had made visits back to Nepal for several months at a time and the family unit had continued its life together and via telephone calls. There was no significant public interest factor justifying a strong reason for this interference with their family life.

Findings and reasons

24. No challenge has been made to the historical facts advanced by the Appellant before me, and, given that the matters that concerned the Judge in the First-tier Tribunal have now been resolved by a more detailed witness statement, I accept the evidence put forward by the Sponsor as credible.
25. The essential history then is this. The Sponsor served in the British Army from 1956 to 1970. The Appellant was born in 1982. He took up the opportunity to settle in the UK, the application process apparently beginning in 2006; he and his wife travelled to the UK and received indefinite leave in 2010. Until the time they travelled, Trisa lived as part of the family unit. Her parents have subsequently visited her, together or separately, for four extended periods from 2012 to 2017. The Sponsor has supported her subsequently financially.
26. On the basis of this history, I accept that family life was extant at the date the Sponsor left Nepal. He and his wife were at that time cohabiting with their daughter who, whilst not an adult, had not yet flown the family nest and was not otherwise independent; they lived within a culture where the expectation was that children would remain with their parents until marriage. The ECtHR in *AA v United Kingdom* (Application no 8000/08) found on 20 September 2011 that "An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'."
27. It is clear that the Appellant and Sponsor have maintained a close emotional relationship; the extended visits to Nepal, notwithstanding that money is in short supply, and their detailed witness statement evidence, demonstrate as much. In any event, as shown by *Rai*, their separation was the product of the "historic injustice" and family life should not be taken to have been broken by the fact of migration alone.
28. As demonstrated by *Patel*, the normal resolution of the proportionality balance, all things being equal, will then be that the family should be allowed to reunite, unless there is some particular public interest factor that causes the scales to be weighed differently. I can see no such factor in this particular case. It is clear that the family unit would have applied to settle in the United Kingdom together at the time of the parental migration had that been an option, and the Appellant has not subsequently formed an independent family unit.

29. The section 117B factors remain relevant, no doubt, but there should be no additional recourse to public funds occasioned by the Appellant's arrival in the UK. She will foreseeably be able to find work given she has studied in higher education, and no doubt she will be able to master English with reasonable proficiency soon after arriving. There is no question of precariousness of residence here, given the Sponsor was granted settlement in the circumstances set out above and has a perfectly good immigration history.
30. I conclude that the immigration decision was disproportionate to the private and family life with which it seriously interfered.

Decision:

The decision of the First-tier Tribunal contained material errors of law.

Following the continuation hearing the appeal is allowed.

Signed:

Date: 13 August 2018

A handwritten signature in black ink, appearing to read 'MAS', with a large, sweeping flourish underneath.

Deputy Upper Tribunal Judge Symes