Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12634/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th March 2018	**On 28th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR PRAN THAPA MAGAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:
For the Appellant: Mr O Manley (Counsel)
For the Respondent: Mr S Walker (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Obhi, promulgated on 30th May 2017, following a hearing at Birmingham Sheldon Court on 11th May 2017. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nepal, who was born on 5th August 1986. He applied for entry clearance as the dependent son of his parents, who are now settled in the UK. His father was a former Gurkha and decided to live in the UK with his wife. The Appellant challenges the decision of the Entry Clearance Officer dated 19th November 2015.

The Appellant's Claim

3. The essence of the Appellant's claim is that prior to his parents moving to the UK, he was part of the family unit. He continues still to be both financially and emotionally dependent upon his parents. He has never worked. The Appellant's maintenance in Nepal is arranged through his father's pension, to be used by him for his maintenance. In addition, his father also sends him money regularly. He has a sister with whom he had been in Australia studying together. However, as a result of his depression and anxiety he was unable to complete his studies and returned back to Nepal. He did not take employment. His parents had visited him in Nepal, but cannot do so indefinitely because of the cost involved. He wishes to be reunited with his family so that he can be with his father as he grows old (paragraph 11).

4. The Respondent Secretary of State was not satisfied that the Appellant was wholly financially or emotionally dependent upon his father. He noted that only three money transfers had been produced. There was no bank statement to show how these transfers had been received. The Appellant claimed to be unemployed but do not appear to accept that he was not entirely employed in the past. The Appellant had lived apart from his parents for a period in excess of two years. He had even lived in Australia. He had done so separately from his parents. The parents were settled without the Appellant in the UK for a period of nine years now. The Respondent did not accept that there was ongoing emotional support and noted that there had not been any visits to the Appellant while he was studying in Australia (paragraph 14).

The Judge's Findings

5. The judge had regard to Appendix K of the Home Office Policy IDI chapter 15(2A) 13.2 (paragraph 21). It was considered that the appeal did not involve their removal, but the ability of the Appellant to join his parents in the UK, as he had been separated from them, because he was unable to come with them when they came, because he was then over the age of 18 years. As soon as the policy was introduced to allow adult dependent children to come to the UK the Appellant had made his application, and a policy was introduced on 1st January 2015, with the Appellant making his application in October 2015. Although the Appellant had gone to Australia for higher education he intended to return back to the family unit. He did in fact return. He was unable to complete his studies due to events which occurred in Australia and there was a detailed psychological report filed on

his behalf. He has said in his statement that he continues to live in the family home in Nepal and that he is financially maintained by his father. His father's pension is paid into his father's bank account and is then accessed by the Appellant directly from his account. His parents also send him money through Western Union and other bank transfers (paragraph 22).

6. The judge was satisfied that the Appellant went to Australia in order to study and that the intention was for him to return to the family unit. In Australia, the Appellant learned that his cousin, who he had considered to be his brother, had been stabbed to death whilst visiting Hong Kong, at the age of 19. He was given this news by his mother. This led to him becoming delusional and feeling numb and lifeless. His sleep pattern became disturbed and he was unable to interact with anyone. This lead to his being unable to study in Australia (paragraph 24).

7. The judge concluded that the Appellant has remained dependent on his parents and that there is a "close knit" family and that the parents have remained responsible for the Appellant. The policy contained in Appendix K acknowledges that "there may be separation of more than two years where the adult dependent child is in education". The judge was satisfied that if the Appellant had completed his studies, he may well have become independent and he may well have obtained employment in Australia. That would have "been a different outcome for him" (paragraph 25).

8. However, in the circumstances of this case,

> "The reality however is that he has never stopped being dependent on his parents. It is important to note that he returned home when things did not work out for him. I have considered the pages of bank statements and the telephone exchanges and I am satisfied that the Appellant does meet the requirements of Appendix K in relation to financial and emotional dependency" (paragraph 25).

9. The Judge had regard to the leading cases such as **Gurung and Others [2013] EWCA Civ 8** and **Ghising and Others [2013] UKUT 00567** and observed that, "these decisions were taking into account when the 2015 policy was formulated as a policy at paragraph 7 refers to the case law and states:

> *"The Home Office has viewed the 2009 Policy, taking into account case law and evidence provided to the all party Parliament group on Gurkha welfare. As a result of this view, the 2009 discretionary arrangements are being adjusted to allow adult children of former Gurkhas to be granted settlement in certain circumstances" (paragraph 27).*

10. The appeal was allowed.

Grounds of Application

11. The grounds of application state, *inter alia*, that,

> "It is submitted that this limited evidence does not demonstrate emotional dependency to the **Kugathas** standard. The ECO does not disagree that a family life exists between the Appellant and his Sponsors; simply that the evidence does not show elements of dependency during the normal emotional ties between adults. There has to be something more" (paragraph 2 of the grounds).

12. The grounds go on to say that, "even if the FTTJ's findings regarding financial dependency were correct, the Tribunal is referred to **AAO v Entry Clearance Officer [2011] EWCA Civ 840**" which was to the effect that, "as for the position of parents and adult children, it is established that family life will not normally exist between them within the meaning of Article 8".

13. On 19th December 2017 permission to appeal was granted.

Submissions

14. At the hearing before me on 9th March 2018, Mr Walker, appearing as Senior Home Office Presenting Officer, on behalf of the Respondent Secretary of State, asserted that he did rely upon the grounds of application, but he would have to say that Judge Obhi has referred to all the evidence in a clear and comprehensive way, and has in the footnotes cited the relevant case law such that, "all the necessary points are covered". He submitted he could not add more.

15. For his part, Mr Manley submitted that, whilst he was appreciative of the sensible approach taken by Mr Walker, in stating that he would not wish to labour the grounds any further, than to say that he would simply seek to rely upon them, but also to add that all the necessary points were covered, nevertheless, he was duty bound to point out, that the grounds were completely misconceived.

16. He submitted that he was earlier today doing another Gurkha appeal before DUTJ Zucker, where the grounds formulated were exactly in the terms which they appear in this appeal. He stated that he had come across at least three appeals in the last ten days where the Gurkha cases were purported to be challenged on the basis of grounds on application that were not only flimsy but actually wrong.

17. First, he stated that the contention that, "the ECO does not disagree that a family life exists between the Appellant and his Sponsors; simply that the evidence does not show elements of dependency …" (at paragraph 2 of the grounds), was simply so unintelligible as to be plainly wrong. If one could not dispute that family life existed, then it made no sense whatsoever to say that the evidence did not show elements of dependency.

18. Secondly, Mr Manley then said that "even if the FTTJ's findings regarding financial dependency were correct", a reliance upon **AAO v Entry Clearance Officer [2011] EWCA Civ 840**, to make the point that "the position of parents and dependants and other children" was such that "family life will not normally exist between them", was also manifestly wrong, as a matter of law. This was because the case of **AAO [2011]** arose prior to the Home Office change of policy in relation to Gurkas which was formulated in January 2016.

19. Second, it is also prior to the Tribunal decision in **Rai v ECO [2017] EWCA Civ 320**.

20. Thirdly, it places reliance upon the **Kugathas** judgment, which is now no longer good law, insofar as it states that emotional dependency between an adult son and his parents would not in itself suffice, because what one was here looking at was a very specific regime, namely, the regime that applies in relation to the Gurkha cases, on account of a specifically recognised "historic injustice" which was to be remedied in these cases.

21. Accordingly, he submitted that he would have to make an application for a wasted costs order.

22. He submitted that he will do so on the following two bases. First, that he makes an oral application now in which all he would claim was his Brief Fee today for attending this hearing. Secondly, and in the alternative, that he could submit a schedule of costs in the next four weeks, such that in the meantime the Respondent Secretary of State would be put on notice of the wasted costs application, but that in this event, if he had to submit a Schedule of Costs, then he and his solicitors would claim the entire cost that had been wasted by the Secretary of State bringing this appeal today.

23. For his part, Mr Walker submitted that he would have to accept that the way that the grounds are drafted do reflect the position that is now outdated and even wrong. He submitted that if there was, as Mr Manley stated, a repetition of such Grounds of Appeal being put in other Gurkha cases, then the matter did need addressing from the viewpoint of the wasted costs jurisdiction.

No Error of Law

24. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

25. First, it is well-known that there have been a number of cases, such as **Gurung v SSHD [2013] EWCA Civ 8**, **Ghising and Others [2013] UKUT 567**, both of which are referred to in the footnote by Judge Obhi, who has set out to deal with the family rights of Gurkha soldiers, in the context of the dependency of the Sponsor's own children, which had been the subject of judgments from the Upper Tribunal and the Court of Appeal.

It is as a result of these decisions that the Home Office policy to redress the "historic injustice" has been formulated and reformulated in January 2016.

26. Second, notwithstanding this, the level of analysis and clarity of decision making, that is required in such cases, has been emphasised most recently by Lindblom LJ in his judgment in **Rai v Entry Clearance Officer [2017] EWCA Civ 320**, in relation to the assessment of Article 8 claims. The question here is whether Judge Obhi has satisfied this level of analysis and a clear decision making. I am in no doubt that she has. The evidence, even under cross-examination, at the appeal before her showed that the Appellant did not do anything other than study while he was in Australia. His father paid his tuition fees. It is true he had lived apart from the father between 2005 and 2009, but he had not been able to work since return to Nepal and he had health problems. In Nepal he continued to stay in the family home. This was a small house acquired by the sponsoring father when he was still in the British Army. The reality now was that the Appellant lived alone, and although there were aunts and uncles in Nepal, they had their own families, and his grandparents were very old (paragraph 17). The sponsoring father's evidence before Judge Obhi was that he spoke to the Appellant on a daily basis. He maintained contact with his son, the Appellant, by visits, through Viber, and through an internet calling site. The money was sent to the Appellant into his bank accounts with Lloyds and Santander, as well as through Western Union (paragraph 18). The judge accepted this level of dependency. Neither the analysis, nor the assessment of that analysis, is in any way overlooked by the judge and the strictures of **Rai [2017] EWCA Civ 320** are amply fulfilled. There is no error of law.

Directions

27. That leaves the question of how I deal with the wasted costs jurisdiction. Given that Mr Manley did make the costs application before me, I have to accept the application, but I have decided to give directions, in a manner such that the wasted costs application is not in any way prejudiced. I give the following directions with a view to ensuring that any application that the Appellant through Mr Manley has made, is properly considered, with an opportunity equally given to the Respondent Secretary of State, to respond to such an application. I give the following directions:

    (a) That by 4pm on 6th April 2018, if so advised, the Appellant shall file and serve:-

        (i) a skeleton argument in support of the application that a wasted costs application should be made; in default of which the application shall lapse;

        (ii) that the skeleton argument be filed with the principal Resident Judge in Field House, and served on Mr Walker, the Senior Home Office Presenting Officer in this appeal;

(iii) that the skeleton argument shall be accompanied by a schedule of costs said by the Appellant to have been wasted;

(iv) that by 4pm on 27th April the Respondent Secretary of State shall, if so advised, file and serve a skeleton argument, in response (so that absent any response the Respondent Secretary of State shall be deemed to have admitted the application). Any response shall also include by way of a costs schedule the extent to which, if at all, in relation to each item of costs claimed, the amount conceded;

(v) liberty to apply.

Notice of Decision

There is no material error of law in Judge Obhi's decision. The determination shall stand. Any application for a wasted costs order is to proceed in accordance with the directions given in the preceding paragraph.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 26th March 2018