



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17640/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19 April 2018

Decision & Reasons Promulgated
On 1 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I.A.M. MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BIKASH GURUNG
(ANONYMITY HAS NOT BEEN DIRECTED)

Respondent

Representation:

For the Appellant: Ms Pal, Home Office Presenting Officer
For the Respondent: Ms O'Callaghan, Counsel for NC Brothers & Co Solicitors,
Reading

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellant is a citizen of Nepal born on 23 December 1991. He appealed the Entry Clearance Officer's decision of 13 June 2016 refusing him entry clearance to the United Kingdom as the son of the sponsor Yan Maya Gurung, the widow of a former Gurkha soldier. His appeal was heard by Judge of the First-Tier Tribunal Gandhi on 24 July 2017 and was dismissed under the Immigration Rules but allowed based on his human rights and Article 8 of ECHR in a decision promulgated on 27 December 2017.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Andrew on 19 February 2018. The permission states that it is arguable that in coming to his conclusions the Judge did not take into account all matters in balancing the competing interests of the respondent and the appellant. In particular, the Judge made findings that the appellant, if he comes to the UK, will not be financially independent and cannot speak English which means that it is unlikely he will be able to find work. There are also issues with accommodation which the Judge did not address. The judge may not have applied the appropriate weight to these matters. Also if the appeal is allowed and the appellant comes to the UK to join his mother, his presence will lead to the sponsor's benefits being reduced and she will become poorer.
4. There is a Rule 24 response/skeleton argument which states that permission to appeal was only sought and granted in relation to the proportionality assessment aspect of the Judge's decision. The response refers to the case of *Gurung* [2013] EWCA Civ 8 which states that an adult dependent child of a Gurkha veteran can establish an Article 8(1) right as he has such a strong claim to have that right vindicated, notwithstanding the potency of the legitimate aim argument, if he can show that he would have settled in the UK years before had that been possible. Gurung also states that the requirement to take the historic injustice into account in striking a fair balance between the appellant's Article 8.1 right and public interest and maintaining a firm immigration policy is inherent in Article 8.2 and it is ultimately for the court to strike that balance. The response goes on to state that the said cases of *Gurung* and *Ghising* [2013] UKUT 00567 (IAC) state that the historic wrong will ordinarily determine the proportionality assessment if the respondent is only relying on a fair immigration policy as the legitimate aim. It states that because of the historic injustice underlying the appellant's case considerations under Section 117 of the Nationality, Immigration and Asylum Act 2002 would have made no difference to the outcome and certainly no difference adverse to the appellant. The response states that the Judge in this case gives weight to the public interest in maintaining a firm immigration policy and applies the correct test in accordance with the case law and when undertaking the balancing exercise, the Judge sets out that he does not find it reasonable or appropriate to expect the family to resolve the difficulty of finances by relocating to Nepal. The response states that the Judge, having balanced all the relevant factors concludes that as there are no additional factors beyond the need for firm immigration control the appeal must succeed.

The Hearing

5. The appellant's mother attended the hearing.
6. The Presenting Officer referred to grounds 1 to 5 of the application for permission. At paragraph 41 the Judge states that there is no evidence that the appellant speaks English and that he will be financially dependent on his mother who is on state benefits which are means tested which means that she only has enough money to support her. The Judge goes on to refer to the appellant having no work experience and because of his lack of English he is likely to find it difficult to work in the United Kingdom. The

Presenting Officer submitted that to grant this appeal would be against the public interest.

7. Despite this the Presenting Officer submitted that the Judge allowed the appeal under Article 8 and she submitted that the Judge materially misdirected himself in law when he did this.
8. The Presenting Officer submitted that the Judge also failed to consider the accommodation situation. The sponsor receives Housing Benefit and lives in a single room, the Judge does not take this into account anywhere in his decision. The Presenting Officer submitted that the sponsor will have to support the appellant on her benefits and she submitted that that is not appropriate and that based on the evidence about the accommodation, the appellant may well not be allowed to live with the sponsor. Nothing has been mentioned in the decision about other accommodation being arranged with friends or family. She submitted that had the Judge taken these issues into account he might well have come to a different conclusion and the Presenting Officer submitted that the Judge has failed to make findings on material facts.
9. She submitted that the Judge's reasoning is not explained and there is a material error of law in the Judge's decision and that Annex K of the Rules does not require to be considered, only Article 8 outside the Rules.
10. Counsel for the appellant referred to her Rule 24 response/skeleton argument submitting that permission is granted purely on the proportionality assessment.
11. She submitted that the Judge took into account all the relevant factors concerning public interest and I was asked to consider paragraphs 12, 33 and 41 of the Judge's decision. She submitted that the Judge deals properly with public interest, giving it the weight it is entitled to and she submitted that the cases of *Gurung* and *Ghising* have been followed by the Judge. She submitted that there is no error of law in the decision and the claim should be allowed under Article 8. She submitted that the appellant's father would have applied to come to stay in the United Kingdom if the opportunity had been there for him so the appellant would have come as a minor.
12. She submitted that in the proportionality exercise it was up to the Judge to strike a fair balance and that the appellant's rights have been weighed against public interest and fair immigration control and in the case of adult children of Gurkhas the appellant's rights must succeed over public interest. She submitted that this is based on the relevant caselaw. At paragraph 42 of the Judge's decision the Judge laid out the proportionality assessment correctly. He submitted that considerable weight should be given to the historic wrong done to Gurkhas and in this case, there is no question of the sponsor having a poor immigration history or of criminal behaviour. She submitted that the Judge was right to allow the appeal under Article 8.
13. I was referred to the case of *Jitendra Rai* [2017] EWCA Civ 320 in which it is accepted that in view of the historic injustice underlying the appellant in that case

considerations under Section 117A of the Nationality, Immigration and Asylum Act 2002 would have made no difference to the outcome and certainly no difference adverse to the appellant.

14. Counsel submitted that the Judge has dealt properly with proportionality at paragraphs 36, 37 and 39 of the decision. She submitted that the economic aspect of this case should not be held against the appellant who would have come to the United Kingdom at an earlier date but for the historic injustice. She submitted that the Judge deals with this at paragraph 40 of the decision in which he refers to the appellant's father having served in HM Forces and the sponsor belatedly being granted settlement in recognition of that service and she submitted that it would not be appropriate to expect the appellant's mother to resolve her financial difficulties by relocating to Nepal in these circumstances.
15. At paragraph 42 the Judge states that Article 8 is engaged as there are no additional factors the respondent can rely upon, beyond the need for firm immigration control. She submitted that refusal would not be proportionate in this case. She submitted that at present the sponsor supports the appellant in Nepal financially, out of her benefits. The appellant speaks some English so there is a possibility that he could get a job in the United Kingdom and could live with his mother where she stays at present. She submitted that there is no error of law in the Judge's decision as he carried out the proper balancing exercise, taking into account the historic injustice and weighing all the factors in the proportionality assessment. I was asked to allow the Judge's decision to stand.

Decision and Reasons

16. First of all, with regard to Annex K which cannot be satisfied it should be noted that this makes no provision for the adult children of Gurkha widows.
17. It is correct that the permission granted in this case hinges on the proportionality assessment required under Article 8 of ECHR. In this proportionality assessment the historic injustice underlying the appellant's case must be given considerable weight. Public interest must be balanced against the appellant's rights. If the public interest is based purely on fair immigration control as a legitimate aim then because of the historic injustice the appellant's claim will succeed, but in this case public interest is not purely the maintenance of a fair immigration policy and the necessity for immigration control in the United Kingdom, public interest also is based on the fact that the appellant speaks little English, is unlikely to be able to obtain work in the United Kingdom and has not lived with his mother for a number of years (since 2014 although she has visited him in Nepal. They had only been separated for two years when the appellant made his application) and importantly that his mother will have to support him out of her benefits which are based on her receiving sufficient sums to support herself not herself and the appellant. The appellant will not be financially independent. If the appellant comes to the United Kingdom the sponsor will be poorer. If the appellant has to claim benefits this must be against public interest.

18. It also must be taken into account that Annex K cannot be satisfied. Annex K paragraph 9(1) cannot be satisfied as the former Gurkha parent has not been and is not in the process of being granted settlement under the 2009 discretionary arrangements. As stated Annex K does not make provision for adult children of an ex-Gurkha widow. The appellant has not been living apart from the sponsor because he was away from the family unit as the consequence of education or the like, he has been living apart as a direct result of his mother migrating to the UK. Paragraph 9(8) of Annex K cannot be satisfied. The appellant stays in his mother's house in Nepal and has no personal incapacity or any medical condition and I find it difficult to understand how the sponsor in this case can be financially supporting the appellant, although the fact that he lives in her house in Nepal goes towards this and the cost of living in Nepal is cheap. Annex K paragraph 9 (5) cannot be satisfied. There appear to be no exceptional compassionate circumstances in this case.
19. I have considered the said case of *Gurung & Others*. This states that if, but for the historic wrong, the appellant would have been settled in the UK long ago, the outcome of the Article 8 proportionality assessment is likely to be in the appellant's favour but this is only where the matters relied on by the Secretary of State consist solely of the public interest in maintaining a firm immigration policy. That is not the case here. The judge in his proportionality assessment should have taken into account the fact that Annex K cannot be satisfied along with the other matters referred to herein. It could be said that these issues along with the public interest in maintaining a fair immigration policy outweigh the consideration of historical injustice. This does not appear to have been considered by the First-Tier Tribunal Judge.
20. The appellant lives in his mother's house in Nepal. His mother settled in the United Kingdom when he was already an adult. He has a sister in Nepal. What has to be considered is how the historical injustice has affected this appellant individually. In the case of *Gurung & Others* it is accepted that historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. It is not necessarily determinative as if it were the application of every adult child of a UK settled Gurkha who establishes that he has a family life with his parent would be bound to succeed.
21. I find that the First-Tier Tribunal Judge may have considered that the appellant as the child of a UK settled Gurkha's widow is bound to succeed with his application but, because of the additional issues weighing in favour of public interest, this may not be the case and I find that there is a material error of law in the First-Tier Judge's decision because of this.

Notice of Decision

Because I find that there is a material error of law in the First-Tier Judge's decision, I direct that that decision is set aside. None of its findings are to stand other than as a record of what was said on that occasion. It is appropriate in terms of Section 12(2)(b)(i) of the 2007

Act and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for an entirely fresh hearing.

The members of the First-Tier Tribunal chosen to consider the case are not to include Judge Gandhi.

Anonymity has not been directed.

Signed

Date 30 May 2018

Deputy Upper Tribunal Judge Murray