Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22933/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19th February 2018

Decision & Reasons Promulgated
On 6th April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR BIKALPA GURUNG
(NO ANONYMITY DIRECTION MADE)

Appellant

And

THE ENTRY CLEARANCE OFFICER FOR NEPAL

Respondent

Representation:
For the Appellant: Mr. R. Jesurum, Counsel, instructed by Everest Law Solicitors.
For the Respondent: Mr. L. Tarlow, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Nepal, born on the 23rd June 1989. He applied for entry clearance for the purposes of settlement as a dependent of his father, a former Ghurka. This was refused on 15 September 2016.

2. His appeal was heard by Judge of the First-tier Tribunal Mace at Hatton Cross on 14 September 2017. In a decision promulgated on 22 September 2017 it was dismissed. It was accepted that the appellant could not succeed under the rules. The judge did not find family life existed within the meaning of article 8.

3. Permission to appeal was granted on the basis it was arguable the judge applied too high a threshold and erred in concluding family life did not exist.

The First tier Tribunal

4. The appellant's parents came to the United Kingdom in May 2012 .When they left the appellant would have been almost 23 years of age. He is now approaching his 29th birthday.

5. The appellant’s sponsor and his mother gave evidence at the First-tier hearing. The judge found inconsistencies in the evidence and did not accept the situation was as dire as described. It was claimed for instance, that the appellant's home had been destroyed in the earthquake which affected Nepal and that he was living in a makeshift hut. However, the judge noted that he shared this with his married brother and his wife and their three children. When the sponsor and his mother visited they stayed with the appellant. Whilst the judge accepted the family home had been destroyed the parlous existence described was not accepted.

6. The judge also did not accept the appellant had never worked as originally suggested. From the evidence of the sponsor and the appellant's mother the sponsor-retained land which the appellant worked. The sponsor acknowledged that the appellant also did some work for which he was paid.

7. It was accepted that the sponsor sent money to the appellant's sister and found that this was used by her and the appellant and was also used towards paying off debt the sponsor had incurred in coming to the United Kingdom.

8. The judge accepted there was ongoing contact between the appellant and his parents but noted that the majority of the entries in the bills provided related to Internet data.

9. The judge referred to limited evidence as to emotional support. The appellant’s sponsor had visited from January to March 2016 and the judge accepted they would have visited more often had they been in a financial position to do so. However, they were reliant upon benefits.

10. The judge did not accept that the appellant was reliant upon the money sent to him by the sponsor and found the evidence at

times inconsistent and contradictory. The judge found that the appellant did work and this went against a claim he could not support himself without his sponsor. Rather, the judge concluded the money sent supplemented his income.

11. At paragraph 18 the judge considered whether family life within the meaning of article 8 existed. The judge pointed out that whether or not it did was specific to the circumstances of each individual case. The judge set out the case law. The judge concluded that the appellant, then aged 28, had not established the existence of family life within the meaning of article 8. The judge pointed out that he was healthy and worked to support himself and farmed land. The property he lived in was of sufficient standard for his parents to have stayed there when they visited. The judge accepted a genuine bond of love between them but the circumstances were not such as to constitute family life. Consequently, the judge did not proceed to a proportionality assessment.

The Upper Tribunal

12. The grounds contend that the judge erred by focusing upon the situation at the date of the decision rather than the family life which had existed before the sponsor's departure and whether it continued. Reference was made to the acknowledged contact between the appellant and his parents; the visit by the sponsor and the fact that visit more often if they were financially able to do so; the provision of accommodation owned by the family. It was suggested because the appellant continue to live in what was the family home he was not living independently. It was suggested the judge applied too high a threshold.

13. The sponsor’s service in the Army and the argument that but for the laws then he would have settled earlier and the appellant consequently would have been born here, were highlighted. It was also pointed out that the considerations in section 117 A and B would not affect the outcome in line with the comments at paragraph 55 onwards of the Court of Appeal in Rai –v- ECO [2017] EWCA Civ 320.

14. At hearing, Mr Jesurum referred again to the service the sponsor had provided to the Crown and that but for the treatment of Gurkhas he would have settled in the United Kingdom and his children would now be British. He submitted therefore that this was not something to be decided upon traditional article 8 grounds but consideration should be modified because of the historical background. The skeleton argument provided refers to a restitutionary approach. He submitted it was wrong to focus upon the sponsor's choice in coming to the United Kingdom. He acknowledged that the judge did cite the correct test but

questioned whether it had been applied. With regard to the appellant's employment he submitted that it was not necessary for dependency to be total to exist. He referred to the continuing contact between the appellant and his parents.

15. In response, the presenting officer submitted that the challenge made was no more than a disagreement with the outcome. The judge had found discrepancies in the evidence presented. The judge has set out the relevant considerations.

Consideration.

16. The judge has made clear findings of fact. The evidence has been analysed and tested. The judge found numerous discrepancies and concluded that the appellant's circumstances were not as dire as portrayed. These have not been challenged. The judge made a rounded assessment setting out the chronology and moving forward to the present situation. The judge has not decided the case on generalities but has focused upon the evidence relating to the strength of the family life. The judge concluded for the purposes of article 8 the appellant was leading an independent life and the notion of family life within the meaning of article 8 no longer existed. In line with this, the judge correctly did not go on to consider proportionality. At paragraph 18 and 19 the judge sets out the proper legal principles. The judge does not draw adverse inferences from the fact that the sponsor and his wife made the choice of coming to the United Kingdom.

17. Mr Jesurum has submitted that the balance in relation to article 8 must take into account historic injustice and there is reference to the restitution approach. However, in my view whether family life within the meaning of article 8 exists is dependent upon the individual facts. In this appeal this is exactly what the judge has analysed. Absent family life then the proportionality assessment does not arise.

18. I find no material error of law established.

Decision.

No material error of law has been established in the decision of First tier Tribunal Mace. Consequently, that decision dismissing the appeal shall stand.

F.J.Farrelly

Deputy Upper Tribunal Judge 19th March 2018