



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/18726/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 25 October 2019**

**Decision & Reasons Promulgated
On 31 October 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR RAJU GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Trumpington, counsel instructed by Howe & Co Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge SL Farmer, promulgated on 10 July 2019. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 13 September 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. On 4 May 2018, the appellant applied for leave to enter the United Kingdom as the dependent son of his father, a former Gurkha soldier. In that application he stated that he was aged 34, unemployed, unmarried, financially dependent upon the sponsor and emotionally dependent upon both his parents.
4. In refusing that application, the Entry Clearance Officer (ECO), decided that the appellant did not come within several aspects of the respondent's policy as outlined in Annex K of the Immigration Directorate Instructions Chapter 15, section 2A. The ECO also considered EC-DR 1.1 of Appendix FM but noted that the appellant had not declared any medical conditions or disability and was able to care for himself. Consideration was given to Article 8 of the ECHR and relevant case law however, the refusal of the application was considered to be justified and proportionate.

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, it was accepted that the appellant could not meet the requirement of the Rules or Annex K. The judge found that while the appellant enjoyed a family life with the sponsor, it was not at the level of dependency required and did not go beyond that of normal adult to parent ties. The decision was found not to breach the appellant's Article 8 rights.

The grounds of appeal

6. The grounds of appeal argued that the First-tier Tribunal judge misdirected herself in her assessment of the appeal and failed to adequately apply the principles in *Kugathas* [2003] EWCA Civ 31, *Rai* [2017] EWCA Civ 320 and *Ghising* [2013] UKUT 567.
7. Permission to appeal was granted on the basis that "*following the judge's finding of family life with the sponsor it may well be that the dismissal of the appeal was unsustainable.*"
8. The respondent did not file a Rule 24 response.

The hearing

9. Mr Tarlow's view, indicated from the outset, that there was certainly an error of law in the First-tier Tribunal decision and little doubt that it was material. He invited me to dispose of the appeal myself.
10. Mr Trumpington made short submissions regarding the judge's muddled findings as to the existence of family life.

11. At the end of the hearing, I found that the First-tier Tribunal judge made a material error of law owing to the contradictory findings as to whether the appellant enjoyed family life with the sponsor. I set aside those findings, preserving the judge's positive credibility findings in relation to the sponsor's evidence.
12. Mr Trumpington made brief further submissions. Mr Tarlow wished to add nothing further.
13. At the end of the hearing I reserved my decision.

Decision on error of law

14. As Mr Tarlow accepted that the judge's findings were muddled, it suffices to say the following. At [24], the judge found that the appellant continued to enjoy family life with his father but discounted this because there was not a "*relationship of dependency akin to that of a minor child.*" That was not the correct test for assessing family life between adult relatives, applying *Kugathas*. The judge further erred in noting at [26] that the appellant could be financially independent and find work in the future. She was obliged to consider the facts before her, which were that the appellant was unemployed and financially dependent on the sponsor, which she accepted to varying extents. The absence of clear findings on the existence of family life and dependency amount to material errors of law.

Remaking

15. In remaking this appeal, I have taken into consideration all the evidence before me, including that contained in the appellant's bundle of evidence sent under cover of a letter dated 20 June 2019.
16. It is common ground that the appellant did not meet the requirements of the Immigration Rules at the date of decision and did not fall within applicable Home Office policy on adult dependants of ex-Ghurkha soldiers found in Annex K.
17. The previous judge found the sponsor to be largely credible and noted that his evidence went unchallenged to a large extent by the respondent's representative. Mr Tarlow did not seek to challenge any aspect of the sponsor's evidence during the remaking of this appeal. Briefly, the sponsor's evidence is that he supports the appellant financially by giving the latter a debit card in order to access the sponsor's army pension. From time to time, additional funds are sent to the appellant in Nepal. The appellant is also accommodated free of charge in the family home which he now occupies alone. The appellant lived with his parents before they left for the United Kingdom. The sponsor travels to Nepal with the appellant's mother in order to visit the appellant and there is regular weekly telephone contact between the appellant and both of his parents. The appellant is unemployed and, as attempts to find him a wife failed, he

remains single. Reliable supporting documentary evidence was provided in the form of money transfer receipts, pension documents, bank statements, travel details, passport copies, photographs and telephone records.

18. The sponsor also informed the previous judge that his only daughter applied for leave to enter at the same time as the appellant and her application was granted. She moved to the United Kingdom at the end of 2018. Mr Trumpington informed me that the appellant's sister could not meet the requirements of Annex K owing to being aged over 30 and the length of time which had passed since the sponsor left Nepal.
19. I have considered what was said in *Gurung*, at [45]: "*Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case.*"
20. The relevant question was whether there existed a degree of dependency over and above that which would be expected in a normal family. I accept that the appellant is and was wholly financially supported by the sponsor, that this support is effective to take care of the appellant's financial needs, that there is frequent telephone contact and visits. In view of the appellant's age, I further accept that this amounts to evidence of a level of dependency beyond what could be expected in a normal loving family.
21. In considering the issue of proportionality, I am required to have regard to the matters set out in section 117B of the 2002 Act, as amended. Those matters being that the maintenance of effective immigration control is in the public interest. In this case, the appellant does not speak English however he is currently financially and accommodated by the sponsor.
22. I acknowledge the issue of historic injustice and have considered the findings in *Ghising*. In particular, I accept that the fact that an adult child has been prevented from following their parents due to an historic injustice is a relevant factor in the proportionality exercise. I am also bound by what was said in *Pun* [2017] EWCA Civ 2016;

"20. The critical feature for the right to rely on the historic injustice is dependency. ..Both the FTT and the Upper Tribunal...have found that there is no dependency and that, to our mind, prevents the historic injustice from having the same considerable weight it must have for adults dependent on their parents at the time when the application is made."
23. In the appellant's case, the unchallenged evidence is that the appellant is emotionally and financially dependent on the sponsor. Documentary evidence of that dependency has been provided along with a consistent, coherent account provided by the sponsor. Furthermore, the respondent accepted that the sponsor would have settled in the United Kingdom earlier were it not for the historic injustice and the appellant would have been born here and been a British citizen. Given the foregoing findings, I have attached considerable weight to the historic injustice issue. I

conclude that considering all matters, including the appellant's emotional and financial dependency on the sponsor and that his sister was granted entry clearance in virtually identical circumstances, that the appellant's circumstances are sufficiently compelling to outweigh the public interest considerations applicable in this case.

24. In conclusion, the respondent's decision to refuse the appellant entry clearance was disproportionate given the circumstances.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision allowing the appeal on the basis that the Secretary of State's decision was not in accordance with the law.

No application for anonymity was made and I saw no reason to make such a direction.

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable for the following reason. The appeal was allowed on the basis of the same evidence which was before the respondent.

Signed

Date:

Upper Tribunal Judge Kamara