

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: HU/02410/2017**

**THE IMMIGRATION ACTS**

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| **Heard at Field House**  **On: 2 May 2018** | **Decision & Reasons Promulgated**  **On: 12 June 2018** | |
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**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA**

**Between**

**ENTRY CLEARANCE OFFICER - NEPAL**

Appellant

**and**

**Mr HARKA BAHADUR**

(anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Ms Z Kiss, Senior Presenting Officer

For the Respondent: Mr R Layne of Counsel

**DECSION AND REASONS**

1. The appellant in this appeal is the Secretary of State for the Home Department. The respondent is a citizen of Nepal born on 10 September 1987. However, for the sake of convenience, I shall continue to refer to them in the designations they had before the First-tier Tribunal.
2. The appellant appealed against the decision of the respondent 27 September 2016 to refuse to grant him entry clearance to the United Kingdom pursuant to Annex K and the IDI Chapter 15.
3. The appellant’s appeal was allowed by First--tier Tribunal Judge Cameron following a hearing at Taylor House on 23 November 2017. First-tier Tribunal Judge Saffer gave permission to the Secretary of State to appeal against that decision to the Upper Tribunal, this dating that it was arguable that the Judge materially erred with regards to section 117B criteria.
4. The First-tier Tribunal Judge made the following findings in his decision which I summarise. It is accepted by the respondent that the appellant is an adult dependent son of his father who the respondent accepts is an ex-Gurkha soldier. Paragraph 14 of the decision states that an applicant child must be between 18 and 30 years of age and at paragraph 15 and that the applicant must be financially and emotionally dependent on his former Gurkha sponsor. Evidence of financial dependency may include the fact that the appellant has not been supporting him or herself by working but has been financially supported, out of necessity by his or her former Gurkha sponsor, who has sent him money regularly from the United Kingdom.
5. The Court of Appeal has recently considered the issue in **Rai [2017] EWCA Civ 320** and at paragraph 17 of that decision has been approved in **Patel** in particular 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 the parents who are now settled here not by leave or by force of circumstances but by the long-delayed right. The respondent argues that the appellant has lived apart from his parents for more than two years at the date of application.
6. The appellant could not apply for both his children to come to the United Kingdom and the appellant was able to obtain work in the UAE while his other son applied for settlement. It was submitted by his father that the appellant was not paid very much in Dubai and after six months it was decided that he should return home. The appellant states that because he was not paid his salary, he had to borrow from a Nepalese worker and his father had to arrange for him to be repaid in Nepal. His father also stated that the appellant has always been dependent on him as he has continued to send him money while he has been living in Nepal.
7. The appellant’s father applied for settlement after change in the Law for Gurkha soldiers and was granted settlement for himself, his wife and their two younger children on 6 July 2010. His elder two children from his second marriage were not successfully able to apply due to their age.
8. The appellant’s father’s evidence is credible and has proved to be a truthful witness. The appellant was born on 10 September 1987 which was subsequent to his father’s discharge from the army. He is however clearly covered by the policy.
9. The appellant does not currently work and apart from a few months’ work in the UAE he has been fully supported by his father. There is evidence that his father had to assist him in the UAE because he was not paid a salary. The father said that he had to take out a loan to assist the appellant because his earnings did not meet his expenditure.
10. After taking into account all the evidence available the Judge was satisfied that the appellant is fully financially supported by his family and has close and regular contact with his family in this country. His family in this country regularly visit Nepal to provide direct emotional support two the appellant and speak to him on a very regular basis providing support.
11. The Judge was satisfied on the evidence available that there has been real and effective support given by the appellant’s father to the appellant and that had it not been for the historic injustice the appellant would have been born in this country. Family life has been established which engages Article 8 (1). The appellant had family life with his parents before their departure to settle in the United Kingdom and it has endured beyond it notwithstanding them having left of Nepal when they did.
12. The Judge took into account section 117B and also took into account the consideration of this in **Rai** at paragraph 55 to 57. The provisions of section 117B must be taken into account with the historic injustice to counter the positive findings that have been made on the appellant’s behalf. The respondent has not put forward any countervailing factors which would in negate the family life established between the appellant and his family. Weight has been given to the historic injustice which has occurred in this family’s position.
13. The Judge was satisfied that when the factors in favour of the appellant our balanced against the respondent’s legitimate aim and that given the historic injustice the respondent’s decision is disproportionate to that legitimate aim and there is no public interest in excluding the appellant from being granted entry clearance to join his family in this country.
14. The Judge allowed the appellant’s appeal pursuant to Article 8 of the European Convention on Human Rights.
15. The respondent’s grounds of appeal are the following which I set out in summary. The Judge has not fully reasoned or explained his finding of emotional dependency which appears to be based solely on the evidence that the appellant is not married and remains in contact with his parents through phone calls and visits. It can be considered fairly normal for most adult children, even unmarried ones, to keep in touch with their parents and occasionally visit. There has to be something more than that.
16. The Judge has failed to outline why he believes that this limited evidence demonstrates emotional dependence to the standard set out in **Kugathas v Secretary of State for the Home Department [2003] INLR 170**. The entry clearance officer does not dispute that family life exists between the appellant and the sponsor, but the evidence does not show elements of dependency beyond the normal emotional ties between adults.
17. The Tribunal is referred to the findings regarding dependency in the case of **AAO v Entry Clearance Officer [2011] EWCA Civ 840** at paragraph 35 which states “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 at all in the absence of further elements of dependency which go beyond normal emotional ties.
18. The Judge notes at paragraph 15 that he has taken account of section 117B though he then goes on to disregard it entirely. The Judge failed to make any relevant findings on whether the appellant can speak English or holds any relevant qualifications or work experience. The Judge has also not made findings on the appellant’s likeliness of successfully integrating into society in this country.
19. It is submitted that the grant of entry clearance to a person who would be reliant on public funds, indirectly through the sponsor is misdirected. The public interest factor must carry substantial weight in any overall proportionality assessment yet has been deliberately dismissed by the Judge.
20. The Judge accepts that the historic justice to trump the respondent’s interest in maintaining a firm immigration policy. However, Annex K was introduced in 2015 specifically to address the historic injustice and in effect supersedes the guidance in both **Gurung** and **Ghising** and there is no need for the Judge to go further in attempting to right the historic wrong.
21. Further it is assumed by the Judge that the appellant’s father would have settled in the United Kingdom upon his retirement, but he has been given the opportunity to do so and the appellant would have been born in the United Kingdom. There is no merit in this argument and it is pure speculation. In any event the appellant’s birth in the United Kingdom would not have automatically conferred British citizenship.
22. At the hearing I heard submissions from both parties at the hearing.

**Discussion**

1. The Judge in a careful decision considered all the evidence in this appeal and came to a decision based on it. The respondent’s complaint is that the Judge did not take into account the public interest set out in paragraph 117B. The respondent’s appeal is a mere disagreement with the findings of the Judge on the evidence before him.
2. There is no issue taken that family life does in fact exist between the appellant and his parents who live in this country in accordance with article 8 (1). The respondent believes that this family life does not attract the protection of Article 8 as the appellant has not demonstrated that his ties are above normal emotional ties between adult parents and children.
3. The Judge however found that the appellant has demonstrated his ties to his parents are above normal emotional ties when considering the historic injustice. **In Pun and others (Gurkhas-policy article 8) Nepal [2011] UKUT 377 (IAC)** where he said that the Tribunal was not being asked to exercise discretion under the policy, but rather that in applying Article 8, the policy should be taken into account when considering the weight to be given to the public interest in maintaining firm and fair immigration control when assessing proportionality.
4. The Judge considered the case of Rai **[2017] EWCA Civ 320** at paragraph55-57 of that decision and found that section 117B will not avail the respondent given the historic injustice and the positive findings that he has made of the appellant**.** The Judge balanced the respondent’s legitimate aim with the historic injustice and found in the appellant’s favour. A different Judge may have come to a different conclusion but that is not to say that there has been a material error of law the decision.
5. It has been held in **Ghising and others (Gurkhas/BOC’s historical wrong: weight) [2013] UKUT 00567 (IAC).** that the historical wrong suffered by Gurkha ex-servicemanshould be given ***substantial weight*** (*emphasis mine*). When the appellant has shown that there is family life and the decision made by the respondent amounts to an interference with it, the burden lies with the respondent to show that a decision to remove is proportionate although I accept that the appellant will, in practice, bear the responsibility of producing evidence that lies within their remit and about which the respondent may be unaware. The Judge was entitled to give substantial weight to the policy in reaching his decision.
6. The House of Lords in **Bekou-Betts v Secretary of State for the Home Department [2008] UKHL 39** states that the Judge must consider the family life of all those who share their family life with the appellant. In the appellant’s case it is the appellant’s parents and his siblings who have been granted settlement status in the United Kingdom. The Judge considered the family life of the appellant’s parents and siblings which he was entitled to do.
7. Under Article 8(1) the appellant must demonstrate that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding them having left Nepal when they did. The Judge found that there is a real, committed and effective support and relationship between the appellant and his parents which has continued after they left Nepal to settle in the United Kingdom.
8. The Judge found that the appellant has been fully supported by his father from the United Kingdom, including paying his debts. The Judge considered that the appellant is still single and has been financially supported by his father from the United Kingdom. The Judge found that the appellant’s family life existed with his parents before their departure for the United Kingdom and has continued.
9. The Judge also considered the evidence that the appellant’s father’s financial situation at the time he came to the United Kingdom was such that he could not apply for both his children to come to the United Kingdom and only arranged for one of his sons to apply for settlement. This is a relevant factor for why the appellant did not accompany his parent and sibling to the United Kingdom.
10. The Judge considered the rights of all the appellant’s family members, which he was legally bound to do. The Judge was aware that the intention of the policy was not to split families. The Judge accepted that the appellant has demonstrated that he has ties with his father and mother over and above normal emotional ties expected between adult children and parents. On the evidence the Judge was entitled to so find.
11. The Judge found that the appellant has family life sufficient to engage Article 8, and that the refusal of entry clearance would be an interference with family life but that that interference would be in accordance with the law. The Judge in the circumstances was entitled to give less weight to the respondent’s requirement of an orderly and efficient immigration control given the peculiar features of adult children of Gurkhas. The Judge considered that the historical injustice goes to the assessment of proportionality but is also operates on the logical necessity of interference.
12. I accept that the Judge speculated when he said that the appellant would have been born in this country had it not been for the historical justice. However, I find that this is not a material error and the conclusion would remain the same. There is no material error in the decision of the First-tier Tribunal and I uphold it.

**Decision**

The Secretary of State’s appeal is dismissed

Signed by Date 20th day of May 2018

A Deputy Judge of the Upper Tribunal

Ms S Chana