



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/13604/2015

THE IMMIGRATION ACTS

Heard at Field House
On 17 July 2018

Decision & Reasons Promulgated
On 1 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MR ARUN SUBBA
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Khalid, instructed directly

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

DECISION AND REASONS

The appellant and proceedings

1. The appellant is an adult Nepalese citizen of an ex-Ghurkha widow settled in the UK. He appealed a decision of an Entry Clearance Officer dated 16 November 2015 refusing his application to settle as such. The ECO noted that the relationship was out-with the terms of the Home Office policy/Immigration Rules intended to right the wrongs of the recognised historic injustice perpetrated against Gurkha and former Ghurkha soldiers, and found that the appellant was not in any event wholly financially and/or emotionally dependent on his

UK sponsor. Looking at the entry clearance rules in respect of dependent relatives the entry clearance officer noted that there was no personal incapacity, the appellant was able to cook et cetera and did not require, due to either age, illness or disability, long-term personal care to perform everyday tasks, and, in any event on his account of financial support from the United Kingdom, there was no reason why he would be unable to continue to live in Nepal with reasonable financial support from the UK. The ECO decided that the evidence was insufficient to establish Family Life was engaged as ties between the appellant and his mother had not been shown to be out of the ordinary.

2. The appellant appealed contesting the finding in respect of engagement of article 8 on family life grounds on the basis of dependency and asserted the decision breached Article 8 rights when the matter of historic injustice was factored into the balance.
3. The Ft -T found that the appellant was dependent as claimed and that family life was engaged, those findings are not challenged. The judge had regard to the Home Office position in respect of the historic injustice and agreeing with the respondent's position that the policy/rules makes no provision to grant leave for adult children of next Gurkha widow found that it was a matter that did not weigh for the appellant in the balancing exercise relevant to proportionality.
4. The appeals, with permission granted at the Upper Tribunal, on the ground of arguable error in the assessment of Article 8, and specifically that having found that there is family life between the appellant and his mother, the judge nevertheless failed to fully appreciate the consequences of the historic injustice and improperly considered herself bound by the particular terms of the immigration rules and Annex K when assessing proportionality.

My consideration and findings

5. Mr Khalid relied on the grounds and grant of permission, and in particular the case of Ghising and Ors (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567 (IAC).
6. Mr Tarlow submitted that there was no error of law because the judge correctly identified that article 8 is not a general dispensing power, the appellant was not within Annex K and accordingly had no entitlement under the rules which was a public interest consideration the judge was entitled to weigh against the appellant. Whilst acknowledging Mr Khalid's argument in respect of the case of Ghising, the judge's overall conclusion was not unreasoned and not Wednesbury unreasonable. The judge had done enough to reason why she found the balance had fallen.

Discussion

7. The case of Ghising makes plain that in the event that family life is established so that article 8 is engaged if there is historic injustice, then absent significant public interest matters, i.e. beyond those of simple immigration control, the weight to be given to the historic injustice will be sufficient to ensure that the balancing exercise falls in favour of the victim of the historic wrong. It is plain from the decision that the judge concluded that on the particular factual circumstances operating here, including of dependence and contact that this was a case where the family life enjoyed by the appellant and his UK sponsor mother engaged article 8. Whether or not there has been an historic injustice does not turn on whether or not the position of the appellant is covered within Annex K. In asking whether there is historic injustice the question is whether the ex-Gurkha would have applied for settlement in 1982. There was no issue before me but that he would have, and his wife the UK sponsor with him.

Similarly, there was no issue, applying the terms of the relevant policies, that such an application would properly have succeeded, so that both the appellant's ex-Gurkha father and the UK sponsor would have been settled in the United Kingdom at the time of the appellant's birth, and he would have been entitled to British citizenship. In that context when asking the question posed in Ghising i.e. but for the historic injustice would the appellant be here? the answer can only be yes. There are no contrary matters weighing in the article 8 balancing exercise save immigration control. It follows that in these circumstances the historic injustice amounts to a compelling circumstance such that the balance in the article 8 exercise must fall in favour of the appellant. Anything less does not operate to recalibrate the scales in response to the historic injustice. In those circumstances it is not necessary for any further fact-finding such that I find I'm able to remake the decision without another hearing.

8. For the reasons set out in the grant of permission the First-tier tribunal judge fell into an error of law.

Decision

9. The decision of the First-tier Tribunal dismissing the appeal reveals an error of law. I set the decision aside and remake it allowing the appellant's appeal.

Signed 
Deputy Upper Tribunal Judge Davidge

Date 26 July 2018