



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07442/2018

THE IMMIGRATION ACTS

Heard at Field House
On 16th October 2019

Decision & Reasons Promulgated
On 7th November 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE KEITH

Between

RAMESH LAKSHAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:

Mr C E Moll, Counsel, instructed by Everest Law Solicitors.

For the respondent:

Mr S Kotas, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 16 October 2019.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Rai (the 'FtT'), promulgated on 2 February 2019, by which she dismissed his appeal against

the respondent's refusal on 20 February 2018 of his application for entry clearance as the adult dependant of his mother, a widow of a former Gurkha soldier. The respondent's decision had in turn considered the appellant's application by reference to article 8 of the European Convention on Human Rights ('ECHR'), rather than by reference to Annex K of the Immigration Rules. It was accepted that the appellant could not meet the requirements of the Annex K, as his father had already died at the date of his application.

3. In essence, the appellant's claims involved the following issues: whether he had family life with his mother, Ms Limbu (the 'Sponsor') who had since resettled in the UK; and if so, whether the decision to refuse entry clearance was consequently proportionate, noting the five stage test in Razgar v SSHD [2004] UKHL 27. The core points taken against the appellant were that he did not have a family life with the Sponsor, to the extent of engaging article 8. He had previously worked in the UAE and was capable of supporting himself.

The FtT's decision

4. Having considered the evidence as a whole, the FtT found that the appellant did not have a family life with the Sponsor. Any financial dependency was on the appellant's deceased father, rather than the Sponsor, but in any event, the FtT did not accept that without the father's pension, the applicant would be unable to survive. While there was a close relationship between the Sponsor and the appellant, who had not yet formed a household of his own, something more was needed to establish a family life for the purposes of article 8, between an adult child and their parent. The FtT found that there were no additional facts suggesting family life beyond normal closeness between the appellant and the Sponsor.
5. The FtT concluded that even if there had been a family life between the appellant and the Sponsor, the refusal of entry clearance was nevertheless proportionate. She referred to the respondent's duty to maintain a firm and fair immigration policy, which weighed against the right of the appellant and the Sponsor to live in the UK. She noted that the appellant did not meet the requirements of the Immigration Rules and this weighed heavily in the balance. Annex K had reflected the historic injustice arising in cases involving family members of former Gurkhas.

The grounds of appeal and grant of permission

6. The appellant appealed against the FtT's decision on 27 June 2019. The grounds of appeal were: (1) the FtT had erred in relying on the incorrect factual assertion that the appellant was dependent on his deceased father, rather than the Sponsor; (2) she had also misdirected herself on the law and in particular on the question of proportionality; and (3) had failed to apply the law to the facts, noting all the positive factors that were said to support the existence of both family life and that the refusal of entry clearance was disproportionate. The appellant's and Sponsor's evidence had been unchallenged.
7. The application for permission to appeal was granted by Judge Boyes on 20 August 2019. Judge Boyes indicated that the grounds were all arguable, including the issue of

whether the FtT had properly considered how the historic injustice to former Gurkha family members should feature in an article 8 proportionality appraisal.

The respondent's submissions

8. Mr Kotas submitted that whether the appellant was dependent on the Sponsor or his deceased father was not material, as at [13], the FtT had concluded that the appellant was not dependent on the pension, regardless of its source. While the FtT had considered a number of factors that were said to be positive in the appellant's favour, nevertheless she had correctly referred herself to the well-known authority of Kugathas v SSHD [2003] EWCA Civ 31 and was unarguably entitled to find on the evidence before her that there was not family life between the appellant and the Sponsor. For example, there was no evidence of emotional dependency and even if there had been financial dependency, that did not go to establishing a family life. The fact that the Sponsor had entered the UK and left the appellant behind counted against the existence of family life, as did the fact that the appellant had previously worked briefly in the UAE, for which he had not been paid, in 2010.
9. On the basis therefore that family life had not been established, nothing turned on the FtT's analysis of the historic injustice to family members of former Gurkhas in the proportionality exercise.

The appellant's submissions

10. Mr Moll reiterated some of the undisputed evidence ignored by the FtT, including the fact that the Sponsor had been granted leave to settle in the UK in 2010 but had not exercised her right until 2018, shortly after the appellant applied for entry clearance and in the meantime, had continued to live in the family home with the appellant.
11. The FtT's proportionality assessment was flawed. Whilst at [19], the FtT had referred to Annex K of the Immigration Rules, the FtT had failed to consider the well-known authority of Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), and the weight to be attached to the appellant's family life, in the absence of any countervailing factors such as an adverse immigration history or offending. Absent countervailing factors, one would normally expect the proportionality assessment to be in the appellant's favour, as indicated by Ghising. The FtT's brief reference in Annex K did not adequately explain or reflect her analysis of the proportionality of the respondent's decision.

Discussion and conclusion on error of law

12. We conclude that the FtT's reasoning in relation to the establishment of family life between the appellant and the Sponsor was deficient, so as to amount to an error of law, in two respects.
13. First, the FtT erred in her assessment of whether the appellant was financially dependent on the Sponsor. We do not accept Mr Kotas's submission that this was not material on the basis that the appellant was not dependent on the pension, regardless

of its source. While at [13], the FtT referred to the pension being available whether the Sponsor was working or not and that there were now only 2 people living in Nepal, as opposed to the previous family of 3, that does not explain why the appellant would not continue to be dependent on the pension, when he is not in receipt of any other source of income. The reasoning at [13] appears to distinguish between support from the Sponsor in her own capacity, as opposed to via her late husband's pension. No such distinction is drawn at [17], where the FtT accepts the ongoing financial support given by the Sponsor to the appellant. It was clear that when read as a whole, the FtT had concluded that the appellant was supported by the Sponsor financially, but she sought to make a distinction between the capacities in which the Sponsor was providing that money.

14. We concluded that was not a distinction that could be validly drawn. While the FtT asserted that the ultimate source of the pension was from the appellant's deceased father, so that the appellant was not dependent on the Sponsor, that was not a conclusion which the FtT could, in our view, rationally reach. The pension that the Sponsor receives is in her personal capacity as the widow of a former Gurkha, in common with all widows and widowers' pensions. They are pensions which may depend on the past service of a deceased spouse, but which are received in a personal capacity by the surviving spouse and do not amount to monies from deceased spouse, which the surviving spouse then administers, almost in the capacity of an agent. Put simply, the Sponsor's pension is her money and any conclusion to the contrary is not sustainable. The analysis of the appellant's financial dependency on the Sponsor was therefore flawed.
15. Second, we concluded that the FtT did fail to consider the wider evidence on the existence of family life. While the FtT had referred herself correctly to the authority of Singh & Anor v SSHD [2015] EWCA Civ 630 on the appraisal of whether family life existed, she failed to adequately appraise the unchallenged evidence in the appellant's case. We accept Mr Moll's submission that one aspect which was not adequately assessed was the fact that the Sponsor was entitled to settle in the UK in 2010, but did not do so until 2018, around the same time that the appellant applied for entry clearance. The FtT did not ask herself why this might be so, and whether that might be supportive of the emotional dependency claimed, particularly in the context of the other undisputed evidence such as the appellant not having established an independent household of his own and not working following his return from the UAE in 2010.
16. Aside from the assessment of family life, we also concluded that the FtT's assessment of the proportionality of the respondent's refusal of entry clearance was flawed. Noting the authority of Ghising, to which we have referred, while the FtT carried out a balance-sheet assessment, it was limited at [18] and [19] and the proceeded on the assumption that because the appellant did not meet the requirement of Annex K, that no weight would be attached to the historic injustice outlined in Ghising, Mr Kotas invited us to consider, on the basis that Annex K post-dated Ghising. However, to ignore the weight of such potential injustice entirely, simply on the basis, as here, the appellant's father was deceased at the date of the application, was an error of law. A

potentially weighty factor in the appellant's favour was ignored in the proportionality exercise.

17. Based on the flaws in the FtT's reasons in relation to the issue of family life and the assessment of the proportionality of the respondent's decision, we set the FtT's decision aside.

Remaking discussion and conclusions

18. Much of the facts were uncontested, and the appellant's evidence unchallenged. There were two issues for us to consider in remaking the FtT's decision. The first is whether the appellant has established a family life between him and the Sponsor, noting the authority of Kugathas. The second issue, taking the fifth of the five-stage test in Razgar is whether the respondent's refusal of entry clearance was proportionate for an appeal outside the Immigration Rules, considering also section 117B of the Nationality, Immigration and Asylum Act 2002 and the authority of Ghising in relation to what weight, if any, we should attach to family life in the context of the historic injustice to former Gurkhas.
19. We find that family life does exist between the appellant and the Sponsor, considering the overall circumstances, and particular aspects of the case. It is not challenged, and we find, that the appellant is single, and has not established his own household. While he lives with a sister in Nepal who herself is independent, that is not inconsistent with his dependency on the Sponsor. He has no other source of income other than the Sponsor's remittances on which he relies, and contrary to the previous findings of the FtT, is financially dependent on the Sponsor. The pension is her income, which she receives in her own right.
20. While the appellant previously worked for a period of a few months in 2010 in the UAE, he was not paid for that work, returned to Nepal after 2 to 3 months; and has not worked since. He lives in the family home that he shared with the Sponsor prior to her travel to the UK in March 2018. He had applied for entry clearance on 26 November 2017, shortly before the Sponsor's departure from Nepal, so that clearly the intention was that they resettle in the UK together, leaving the appellant's independent sister in Nepal. Despite having obtained leave to settle in the UK in 2010, the Sponsor did not leave the appellant in Nepal, but continued to live with him from 2010 to 2018. The fact that the Sponsor delayed her departure is telling, as it relates to an important life-changing decision about where a family unit or family members will live.
21. While financial dependency alone is not sufficient evidence to amount to a family life between an adult son and his mother, the combination of factors together is sufficient: the financial dependency and the appellant's lack of work; his lack of any independent family unit other than his mother; their cohabitation for almost the entirety of his life and associated close and regular contact; and the fact that the Sponsor was willing to forgo, for many years, the benefits of re-settling in the UK, in order to live with, and support, the appellant. The absence of evidence pointed to by Mr Kotas as to the Sponsor making important decisions in the appellant's life, such as in relation to medical treatment, does not undermine the enduring nature of the family relationship

between the appellant and the Sponsor, as exemplified by her decision to forgo initially the exercise of her right of resettlement. Moreover, the appellant's unchallenged evidence was that he had sought work in the UAE, because his mother sent him there. The Sponsor's influence clearly extended to life-changing decisions such as the appellant's unsuccessful attempt to work overseas.

22. Nor did we regard as undermining the existence of family life the fact that the appellant had worked and had only returned to Nepal because he was not paid. The reason why he returned becomes immaterial, if, as here, the facts are that he has not worked for many years and lives off his mother's generosity.
23. We were fortified in our conclusion, noting that there is no requirement of exceptionality in finding that family life exists, for the purposes of article 8. Each case is fact-sensitive and the overwhelming evidence here is of someone who, albeit now aged 31 years' old, retains sufficiently strong family ties with his mother to engage the operation of article 8.
24. We considered the proportionality of the respondent's decision interfering with the appellant's family life with the Sponsor, outside the Immigration Rules. We accepted Mr Kotas' submission that on the one hand, there was no 'near miss' in terms of Annex K. On the other hand, we accepted Mr Moll's submission that we should consider the proportionality of the Decision through the lens of Annex K, an excerpt of which we considered at [104] of the appellant's bundle.
25. We considered the criteria of Annex K. While the appellant's father was deceased and so could not be in the process of being granted settlement; nor could the question be answered, without some speculation, of whether the deceased father would have resettled in the UK had the option been available before 1 July 1997, nevertheless it was notable that the appellant's father, on retiring from the Brigade of Gurkhas in 1993, then moved to a British enclave, Hong Kong, to find work as a security guard, as he was unable to find work in Nepal, before ill-health prevented him from working further and he died in 2005. Another factor in Annex K is an applicant's age, which the appellant met (he was 30 years old at the date of his application for entry clearance). While he is no longer emotionally and financially dependent on his deceased father, that is by virtue of his father's death, prior to which he remained part of his father's family unit, even if separated because of his education. He has not formed an independent family unit and does not fall for refusal on grounds of suitability (such as a poor immigration history).
26. Applying a 'balance sheet' approach to assessing proportionality, in terms of the factors against the appellant's appeal, he does not meet the strict requirements of Annex K and the maintenance of immigration controls is in the public interest, considering section 117B of the 2002 Act. In addition, his proficiency in English is unclear, despite a school leaver's certificate dated 2005 ([27]) suggesting some level of education in English; and his limited work record suggests that he could well be a burden on the UK taxpayer if permitted to settle in the UK.

27. In the appellant's favour are the factors already outlined by reference to Annex K. While Annex K post-dates the authority of Ghising, we do not except that in consequence, the historic injustice to the family members of former Gurkhas is reduced from being a very weighty, if not determinative factor, in the event that family life is shown, to of no or very limited weight if the precise requirements of Annex K are not met. We conclude on the particular facts of this case, where the appellant cannot meet those requirements principally because the former Gurkha is now deceased, but where family life continues with his resettled widow, that the historic injustice should, on the particular facts of this case, have significant weight. In the absence of other strong countervailing factors such as an adverse immigration history, we concluded that the continuing family life coupled with the significant weight of the historic injustice does ultimately outweigh the factors which were against the appellant. Annex K envisages financial dependency and a risk of a burden to the UK taxpayer.
28. In summary, weighing up all of the relevant factors, we concluded that the respondent's refusal of entry clearance showed a lack of respect for his right to family life that was disproportionate and breached the appellant's rights under article 8.

Decision

29. The First-tier Tribunal's decision contained an error of law and we set it aside.
30. The appeal is allowed on human rights grounds.

Signed J Keith

Date: 5 November 2019

Upper Tribunal Judge Keith

TO THE RESPONDENT
FEE AWARD

The appeal has succeeded. We regarded it as appropriate to make a fee award of £140.

Signed J Keith

Date: 5 November 2019

Upper Tribunal Judge Keith