



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001897
(HU/00589/2021)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 May 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Surendra Limbu

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr Balroop, Counsel instructed by Everest Law
For the Respondent: Ms Ahmad, Senior Home Office Presenting Officer

Heard at Field House on 13 April 2023

DECISION AND REASONS

1. The Appellant is a national of Nepal born on the 17th May 1991. He appeals with permission against the decision of the First-tier Tribunal (Judge Mayall) to dismiss his appeal on human rights grounds.

Background and Matters in Issue

2. The Appellant is the son of a former Gurkha. His father has now passed away, but it is not in issue that he served in the Brigade of Gurkhas, or that his widow and another son subsequently and successfully applied to settle in the United Kingdom on the basis of policy and caselaw formulated in recognition of the historic injustice of not permitting members of that regiment to settle in this country.

3. The Appellant applied for leave to enter to join his mother and brother in the UK in October 2020. He was refused shortly thereafter, on the grounds that the Secretary of State's policy did not extend to the "children of widows" of Gurkhas, and that he had not established that he continued to share a 'family life' for the purpose of Article 8 with his mother, who sponsored his application.
4. On appeal the First-tier Tribunal did not explicitly address the first of these grounds in any detail, but appeared to reject it at its paragraph 28, where the Tribunal acknowledges that if it found Article 8 to be engaged, the appeal would fall to be allowed because of the very great weight to be attached to the historic injustice point. This is no longer an issue in the appeal but for the sake of completeness I would endorse the Tribunal's approach: the distinction between the son of a Gurkha and the son of a deceased Gurkha - or as the Respondent puts it "the child of a widow of a Gurkha" - is a false one for Article 8 purposes.
5. It was on the basis of the second issue that the decision of the Entry Clearance Officer was upheld. Judge Mayall was not satisfied that Article 8 was engaged at all. He paid particular regard to evidence that the Appellant's mother had given in the 2017 appeal of the Appellant's younger brother Bishnu. She had then told the court that although she sent money to both her sons, she was particularly concerned about, and close to, Bishnu because he was the "baby" of the family. At that time the Appellant was living somewhere else in Nepal, she did not know if he was working and she only managed to send him a "little money". Today, Judge Mayall noted, she had produced money transfer receipts showing that she had been sending the Appellant money since at least July 2019. He was not satisfied that any amounts sent prior to that were meaningful. That being the case, he reasoned, 'family life' between this adult son and his mother had ceased to exist in the years that he had established his own independent life and she had moved here. It could not now be "revived" by the fact that she had started sending him money. Judge Mayall was not satisfied that there was there "effective, real or committed support" as required by the caselaw. There was no family life here to interfere with, and the appeal was accordingly dismissed.
6. The Appellant now has permission to appeal on the grounds that Judge Mayall failed to have regard to all of the relevant findings made by the Tribunal in 2017, in particular the evidence recorded that the Sponsor continues to be close to both of her sons, but more importantly failed to have regard to the Sponsor's evidence in the present appeal that the Appellant *currently* sustains himself by working the family land - now owed by her - and by receiving her remittances. Mr Balroop places reliance on what is said about the existence of family life in such cases in the Court of Appeal decision in Jitendra Raj v Secretary of State for the Home Department [2017] EWCA Civ 320. It is not an elevated test requiring decision makers to look for some exceptional or compelling factors in the scenario with which they are presented. The question is simply whether there is, between these adult family members, "real", "committed" or "effective" support: Kugathas [2003] EWCA Civ 31.

Discussion and Findings

7. I deal first with the alleged error of failing to take relevant evidence into account. In his written evidence the Appellant asserted that he is economically dependent upon his mother because his entire livelihood depends on her: she sends him money from the UK, and he further sustains himself from working land

she owns. In submissions this was advanced as material evidence establishing that he depends on his mother in a real, or effective, manner. The First-tier Tribunal does make reference to the remittances, but not to the issue of the land. Mr Balroop submits this to be a material omission in its reasoning. Had the Tribunal factored into its analysis the continued dependence on land owned by his mother, its decision that this is an adult male leading an independent life might have been different. I agree that the Tribunal does not appear to have considered that evidence.

8. Supplemental to this ground is Mr Balroop's contention that the Judge also misunderstood something else about that land. The decision refers to, and adopts, evidence given in the 2017 appeal that the Appellant was living separately from his mother and brother before her departure for the UK: "Surendra lived somewhere else in Nepal". Mr Balroop submits that whilst this was technically correct it does not engage with what the unchallenged evidence of Mrs Limbu actually was in this case.
9. Mrs Limbu explained the family history in her witness statement. They had, after her husband Padamdhoj's discharge from the army, returned from Hong Kong to their home village in Teenpaeni, Sundarpur where they had managed to survive by farming, supplemented by what she described as his "meagre" army pension. In 2011 their son Premkumar had fallen ill. He had kidney failure, and despite selling off parcels of land they did not have the means to pay for treatment that could save him. After he died her husband was heartbroken. He became very depressed and ill himself. He could not get treatment in the village. As she explained:

13. During the illness of Padamdhoj, I and Bishnu would stay mainly in Dharan leaving Bishnu [*I accept that this is a typographical error and that this should read 'Surendra'*] on his own in the village. My daughter Binu was married to a Gurkha soldier in the Indian Army. She was living nearby in the village too. We had to be in Dharan because of the treatment of my husband. In his final stages, he was taken to Kathmandu. I and Bishnu lived in rented accommodation in Dharan until I came to the UK.

...

17. At the previous hearing, I did not say I did not know what Surendra was doing in the village. I said he was not doing anything. The property that we lived in in the village originally belonged to my late husband and when we needed money for my son Premkumar, most of the land was sold. When my husband fell ill and had to be brought to Dharan, the cost meant that we had to take the loan against the property. My son Suren (short for Surendra) had to stay behind in the village to work in the fields to make the living. The land belongs to me since the death of my husband. Suren lives there and spend time in the field to grow food.

18. Once every 3 months, I and my husband and Bishnu would go to the village and spend about 2 to 3 weeks at home and then return to Dharan. Suren also came to visit us once a year. The

crops grown in the village had never been the source of our food. It only provided a small percentage of our needs. We have always had to buy food. My husband's Army pension was our provider. When we met Suren, we would give money to him to replenish the food supplies and for other costs.

10. The import of this evidence is, Mr Balroop says, missed by the First-tier Tribunal entirely. It is not that Surendra went off to another place in Nepal to establish an independent family life, it is that he stayed where he was, and it was his mother and Bishnu who moved to the city, a move forced by the circumstances of his father's illness. At this stage he and Bishnu were the only sons left in Nepal to care for his mother: as the younger brother Bishnu took up the role of providing day to day support for her, whilst as the elder the Appellant took on the responsibility of looking after the last remaining piece of family land. None of that had appeared in the 2017 decision relating to Bishnu because it had not been relevant to his appeal: the judge's focus there had been that Bishnu and mother had been living together.
11. I accept that none of that evidence appears to have been considered by the First-tier Tribunal. In the absence of a Presenting Officer Mrs Limbu's evidence had gone unchallenged and the decision nowhere suggests that any of it was questioned by the judge. I further note that it is supported and supplemented by the written evidence of the Appellant himself, and that of his brother Bishnu, who paint a picture of a traditional multi-generational rural household riven apart only by poverty and tragedy. So whilst I accept that this omission led the Tribunal to make a mistake of fact about the "somewhere else" that Surendra was living, in my view it also led the Tribunal to overlook something more fundamental about this family unit. The cultural norm in Nepal is for sons to remain living with their parents, even after marriage; as parents age, the dependency that once existed between child and parent is reversed so that the elder becomes dependent upon their grown sons. Living together in this way is natural, and expected, and the adults in these families do not regard themselves as more remote or independent of each other than they would be from minor children in the household. That inter-dependency is not simply economic: it is emotional and practical. Intervening events such as those experienced by this Gurkha family - posting overseas, illness, poverty and death - should not be presumed to perform a mechanical severing of these ties.
12. Here I am satisfied that the Tribunal has overly focused on two aspects of the evidence - the love that Mrs Limbu had for Bishnu, as expressed in his 2017 appeal, and the bald fact that at the date that she left Nepal she was not living under the same roof as the Appellant. In doing so it has overlooked the fuller picture offered by the witness statements, which is one of the Appellant simply doing his duty *as part* of this household. Accordingly I am satisfied that Mr Balroop's second ground - in effect that the Tribunal cherry-picked from the 2017 decision on Bishnu - is made out.
13. It follows that the errors of law are made out and I am satisfied that the decision of the First-tier Tribunal should be set aside. Before I proceed to remake the decision it is appropriate that I address another issue that arose in submissions. The First-tier Tribunal found that family life had ceased for the purpose of Article 8 at the time that Mrs Limbu left Nepal. At its paragraph 27 it went on to find that the remittances sent monthly from July 2019 could not "somehow revive" the

family life between mother and son. For the reasons I have set out above I am satisfied that the premise here was flawed, but there is to my mind another difficulty with this approach. Ms Ahmad adopted the Tribunal's reasoning to submit that a family life which has come to an end cannot, as a matter of law or fact, subsequently be revived. That is not a proposition I can accept. As a matter of principle, whether or not a family life exists for the purpose of Article 8(1) is a question of fact, to be decided at the time of the appeal. Ms Ahmad did not cite, and I could not find, any legal authority to support her submission. Even if family life did not exist when Mrs Limbu left Nepal in 2016 that does not mean that it cannot exist today, although obviously the family history would be relevant to that question of fact.

14. Having read all of the witness statements that were before the First-tier Tribunal, and having had regard to the evidence given in Bishnu's appeal in 2017, I am satisfied that there is between this mother and adult son a relationship characterised by real, effective and committed dependency upon one another. He has been dislocated physically from his mother since she left Nepal – and as the First-tier Tribunal notes, intermittently for some time before that – but that is of neither of their choosing. I am satisfied that he is financially dependent upon her: in addition to the monthly remittances sent from the UK he subsists by farming her land. In respect of the latter she remains practically dependent upon him. But moreover I am satisfied that there remains between mother and son the strong bond that exists normally and naturally in rural Nepali families who chose to continue to live in the 'joint family system'. As Mrs Limbu has explained to both of the Tribunal's that she has appeared before: she is close to both of her sons. I am satisfied that there is a family life here which engages Article 8.
15. That being the case, little more needs to be said. The First-tier Tribunal accepted that had that been its finding, the appeal would have been allowed on the grounds that the decision is disproportionate because of the very great weight to be afforded to the historical injustice of not permitting members of the Gurkha regiment to settle in the country that they served. Given the sad history of this particular family, that has been an injustice with profound inter-generational consequences for the people involved. There being no countervailing matters weighing against the Appellant, it follows that his appeal must be allowed.

Notice of Decision

16. The appeal is allowed.
17. There is no order for anonymity.

Upper Tribunal Judge Bruce
19th April 2023

