



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002941
LH/01448/2024
HU/57387/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 4th October 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Khem Chandra Gurung
(no anonymity order made)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr West, Counsel instructed by Everest Law Solicitors
For the Respondent: Ms Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 1 October 2024

DECISION AND REASONS

1. The Appellant is a national of Nepal, born on the 8th August 1965. He appeals with permission against the decision of the First-tier Tribunal (Judge Young-Harry) to dismiss his appeal on human rights grounds.
2. The Appellant seeks entry to the United Kingdom so that he can settle here. He is, it is accepted, the son of the late Mr Bhakta Bahadur Gurung, a Gurkha soldier who served in the British Army between 1954 and 1969 and in that time saw active service in India, Malaysia, Hong Kong and Borneo. Bhakta Bahadur Gurung's widow, the mother of the Appellant, is Mrs Aiti Maya Gurung. She was granted settlement in the UK in 2010.
3. The Appellant asserts that he should be given entry clearance because he enjoys an Article 8 family life with his mother; the decision to refuse entry clearance amounts to a disproportionate interference with that family life, and

the historic injustice perpetrated against Nepalese Gurkhas is such that there would be no public interest in refusing him entry. The Appellant contends that had his father been permitted to settle in the UK at the time that he served and/or retired, as it is now accepted, he should have been, then the Appellant himself would now be British.

4. Before the First-tier Tribunal it was common ground that the principle matter in issue in this appeal is whether there is here an Article 8 family life in play. If there is, then the authorities tended to indicate that the appeal must be allowed on the proportionality grounds: see for instance Rai v Secretary of State for the Home Department [2017] EWCA Civ 320, Ghising and Ors (Gurkhas/BOCs: historic wrong; weight) (Nepal) [2013] UKUT 567.
5. The First-tier Tribunal was not satisfied that there was a family life. The Sponsor, Mrs Gurung, came to live in this country in 2010. The Appellant was himself married before she left and had a family of his own. Although he divorced in 2014, this is evidence that he was leading an independent life. He was employed as a football coach and it was assumed that he supported his family with that income. The evidence of financial dependency between the Appellant and his mother was lacking. In particular there were few money remittance receipts; although he claims he has access to, and withdraws, his mother's widow's pension, there is no supporting evidence to confirm this. The Tribunal referred itself to the decision in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and concluded that the Appellant had not demonstrated that there were more than the normal emotional ties that an adult son might share with his mother. The appeal was thereby dismissed.
6. The Appellant successfully sought permission to appeal to this Tribunal. He submits that the First-tier Tribunal has erred in its approach to whether Article 8 is engaged. In particular he submits:
 - i) That the authorities indicate that the threshold for engaging Article 8 are relatively low. There is no requirement to demonstrate some dependency in a particular direction. What is required is that there is some degree of dependency between the parties. This can include emotional dependency. The Tribunal failed to evaluate the evidence in respect of this in its decision;
 - ii) In any event the Tribunal erred in its analysis of the financial dependency that the Appellant has upon his mother. It was not his evidence that he withdraws her pension (a contention rejected for want of corroborative documentation): in fact it was his evidence that his mother gives him a lump sum, saved from her pension, when she visits him in Nepal.

Discussion and Findings

7. Mr West began by emphasising ground (i). It is trite that the threshold for engaging Article 8(1) is a relatively modest one. He pointed out that twice in its decision the First-tier Tribunal misdirects itself that the applicable test is "real, effective *and* committed support" when in fact the authorities establish that the test is rather the disjunctive "'real, effective *or* committed support": see paragraph 17 of Kugathas.

8. Whilst I accept that the First-tier Tribunal has misstated the test, as identified by Mr West, I am not satisfied that anything turns on it in the context of this appeal. Mr West was unable to identify any particular reasoning which flowed from all three of the adjectives being applied.
9. Whilst I do have more sympathy with the submission that the Tribunal perhaps set too high a threshold, I need not address ground (i) in any more detail because I am satisfied that the decision falls to be set aside for the error of fact identified in ground (ii).
10. Having set its focus on financial, rather than any other kind of, dependency the Tribunal notes that there are only a few remittances showing that mother has sent funds to son. Mr West takes issue with that statement, but setting that objection aside, he relies on the Tribunal's own reasoning to submit that if that was right, it was incumbent on the Tribunal to evaluate with particular care the remaining evidence on financial dependence. The evidence of the Appellant himself was as follows:

“My mother leaves me with cash from her widow pension during every visit. The amount varies from NRP 100000 to 150000 (GBP 600 to 900 approximately). I keep this as my savings. I give some of it to my younger daughter Prabina”
11. This was evidence that the Sponsor repeated in both her written and oral evidence. As Mr West rightly says, that evidence was not disputed in the refusal letter, nor was it challenged at the hearing, since the ECO did not send a representative to the hearing. The evidence was that the money is handed over to the Appellant in cash: there is no 'paper trail'. It is therefore an error of fact for the Tribunal to have stated that the evidence was that he “withdraws” his mother's pension, and to have drawn negative inference from the failure to prove it.
12. I am further satisfied that there were matters in the evidence which go directly to whether there is a 'family life' here, including the Appellant's assertion that his continued closeness to his mother was a central reason for his divorce, that the Tribunal fails to incorporate into its assessment.
13. The parties before me agree that mistake of fact is a species of unfairness and in those circumstances, it would be appropriate that this matter be remitted to be heard *de novo* by another judge of the First-tier Tribunal.

Decisions

14. The decision of the First-tier Tribunal is set aside.
15. The decision in the appeal is to be remade by a Judge of the First-tier Tribunal other than Judge Young-Harry.
16. There is no order for anonymity.

Appeal Number:
UI-2024-002941

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
1st October 2024