Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02934/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing On 11 April 2018	**On 1 May 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

CHANDRA KUMAR LIMBU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Nepal whose appeal against the respondent's decision refusing to allow him entry clearance for settlement founded on his father's previous service in the Brigade of Gurkhas had been dismissed by First-tier Tribunal Judge Geraint Jones QC. Although the appellant was initially refused permission to appeal against this decision, it eventually transpired that the judge who had refused permission had not been aware that grounds of appeal had been served, and also that a skeleton argument (which the judge thought had not been before the First-tier Tribunal Judge) had in fact been before Judge Jones. When this

misconception came to light permission to appeal was granted by Upper Tribunal Judge Rimington on 25 September 2017.

2. The appeal subsequently came before this Tribunal on 15 December 2017 when I found that there had been an error of law in Judge Geraint Jones QC's decision. I set out my reasons in a decision which I gave orally immediately following that hearing. I also gave directions. The bulk of what I decided on that occasion will be paraphrased below.

3. I noted that appearing on behalf of the respondent, Mr Tufan (who was then representing the respondent) accepted (although he could not formally concede this) that in his words "I would be hard-pressed to argue that [the decision of Judge Jones] is sustainable", in particular with regard to the finding that Judge Jones had made at paragraph 25 of his decision.

4. I noted that I understood it to be common ground between the parties (and this remains the case) that the appeal of this appellant turned on whether or not his Article 8(1) rights to family life were engaged. It was and remains the appellant's case, as advanced by Mr Jesurum, who has himself been involved in a number of previous appeal which have been considered by the higher courts in relation to the families of Gurkha veterans (and in particular in the most recent decision in *Rai v Entry Clearance Officer – New Delhi* [2017] EWCA Civ 320) that in cases where it is either accepted or held that a veteran would have applied for settlement and his minor children or child would have applied with him at the time, and where the family life with that minor child or children had continued into adulthood, absent weighty reasons, settlement should be granted to that child. I note at this point that in the refusal letter dated 2 July 2015 the respondent had stated in terms that "I am minded that an application for settlement would have been made [by the appellant's father, the Gurkha veteran] before 2009 had the option to do so been available to the sponsor on discharge before 1 July 1997". As I stated in my decision as to error of law, the important issue which a Tribunal will always have to consider in such cases is first whether there was family life between the child applicant and his father at the time that his father would otherwise have applied for settlement and, secondly, provided that is the case, whether that family life is still in place. At the error of law hearing this analysis of the legal issues was not challenged on behalf of the respondent and it was common ground between the parties that the crucial issue in this case was, as it had always been, whether or not there was such family life between the appellant and his father now as to engage Article 8(1). The appellant's case is that if there was and by reason of the "historic injustice" in refusing serving Gurkha soldiers a right of settlement earlier, it will in most cases not be proportionate to continue to refuse settlement to a (now adult) child applicant. As will be apparent later, the respondent not only did not seek to challenge that proposition at the error of law hearing, but she does not seek to challenge it now either.

5. I found that the judge had made an error of fact in his decision by failing to avert to what was clearly stated at page 51 of the bundle which had been before him with regard to the appellant's "persistent delusional

disorder" for which he had been prescribed drugs. This was relevant to the issue of whether or not there is currently family life between the appellant and his parents because it goes to the reasons why his mother in particular returned to Nepal on a number of occasions after settling in the UK. At page 22 of the bundle which was before the First-tier Tribunal there is set out a schedule of the dates on which the appellant's mother returned to be with her son after settling in the UK, amounting to some nineteen months in total. If one of the reasons why she had returned and continued to return so often was because of the appellant's need for family support, this was relevant when considering the extent of the appellant's dependence on his family, which is one of the factors the Tribunal needed to have in mind when considering whether there was still extant family life.

6. I found that the judge's failure to take account of the appellant's medical condition as it appeared in the evidence was a material error. The highest that Judge Jones had considered the position to be was that the appellant had "some kind of panic disorder" which is not an adequate finding with regard to evidence of what is a specific medical condition.

7. I also expressed concern as to the judge's treatment of the evidence of the doctor. At paragraph 25 of his decision the judge had referred to the evidence of "a Dr Kale" in which the doctor, having stated that the applicant lived alone, had continued that "no one is taking his responsibility. He needs family care and social support for further improvement of his illness". The judge then continued as follows:

> "The illness is not identified. I am in no doubt that the final three lines of that letter were added at the request of or at the instigation of the appellant and/or one or more of his parents because ordinarily a doctor would not simply volunteer that kind of comment. There can be no doubt that he was asked to do so with a view to this letter being deployed as it has been in this appeal".

8. At the error of law hearing, as already noted above, Mr Tufan, on behalf of the appellant had very fairly accepted that this specific finding was not sustainable and I agree that this concession was rightly made. I considered that the submissions made by Mr Jesurum with regard to this finding were unanswerable. This finding was unfair because:

   (a) this argument had not been relied on by the respondent in the refusal letter, even though the medical evidence had been before the respondent;

   (b) it was not relied on in any Entry Clearance Manager's review (which in fact in this case never seems to have been undertaken);

   (c) it was not relied on by the respondent at the hearing (the respondent having not been represented);

   (d) it was not raised by the judge with the sponsor when he had been giving evidence, and indeed at no point did the judge record any

question having been put to the sponsor as to the opinion expressed by the doctor (I noted also in my error of law decision that the judge had even misrecorded the name of the doctor who is in fact Dr Kafle and not Dr Kale, let alone "a Dr Kale"); and

(e) it had not been raised with the appellant's Counsel during submissions.

I agreed with what was set out in the ground at paragraph 18 that "The appellant therefore had no way of knowing the point was in issue or addressing the FtTJ on it". I found that this finding by the judge that he was in "no doubt" that the doctor's contention within his report that "[the appellant] needs family care and social support for further improvement of his illness" and that "the chance of recurrence is high without its family support" can only be explained by the instigation of the appellant and/or one or more of his parents does not go beyond speculation and there is no proper basis for such a conclusion being made, especially in circumstances where neither the witnesses nor Counsel had been given an opportunity to address him on this point. It is also fair to say in this regard, which is a point made at paragraph 20 of the grounds, that the judge made this finding without even considering when dealing with this aspect of the case the evaluation made by the appellant's father's commanding officer contained within the appellant's bundle before him at page 43. Although the judge referred in passing to his exemplary record, he nonetheless saw fit to make what is said in the grounds to be "a serious imputation of procuring the insertion of untrue opinions in a doctor's letter".

9. The judge's self-direction at paragraph 3(ii) of his decision was, I found, also wrong, where he had said that "Although nothing like [sic] to turn on it in this appeal, I reject the submission that dependency will be established where a person receives real or committed or effective support". As Mr Jesurum submitted before me, this self-direction ran counter to what was decided not just in *Kugathas* [2003] EWCA Civ 31 but also affirmed and developed by the Court of Appeal in *Rai*, in particular at paragraphs 37 to 39 where the court accepted in substance the submissions which Mr Jesurum had made in that case which was set out at paragraph 36. There was, as I found, an abundance of evidence before the judge from which he could properly have found that there was family life still between the appellant and his parents, such that in accordance with both *Kugathas* and *Rai* a finding could properly be made that it was not proportionate to refuse his application for settlement in light of the guidance previously given in particular in *Rai*. For these reasons the judge's unfairness in the manner in which he dealt with the medical evidence and his failure properly to consider the effect of the appellant's medical condition with regard to the issue of dependency and the importance of the assistance given by his parents (and his dependence on that support) was highly material.

10. Accordingly, I set aside Judge Jones's decision as containing material errors of law and directed that the appeal would be relisted before me in order that I could decide the relatively narrow issue still to be determined.

I gave directions as to the service of further evidence and this evidence was subsequently served, albeit later than I directed. However, very fairly, on behalf of the respondent before the Tribunal today, Mr Avery does not contend that the respondent has been prejudiced by the late service of the bundle and so no point is taken with regard to that.

The Hearing

11. At the hearing before me today I heard evidence from both of the appellant's parents, who both gave their evidence with the assistance of a Nepalese interpreter. Both of them relied upon statements they had previously made, and with regard to the appellant's father, he also relied on a further statement which was contained within the supplementary bundle which had been served in accordance with the directions I had previously given. I was also addressed on behalf of both parties. I will refer below only to such of the evidence and submissions as are necessary for the purposes of this decision, but I have had regard to everything which was said to me as well as to all the documents contained within the file, whether or not they are specifically referred to below.

12. At the outset, both parties agreed that in light of the various decided cases which are contained either in the appellant's bundle originally before the First-tier Tribunal or in the supplementary bundle which was prepared for today's hearing, the issue which the Tribunal has to determine is whether there is now family life between the appellant and his Gurkha veteran father. The authorities establish (and Mr Avery does not seek to persuade the Tribunal otherwise) that if the situation is that a Gurkha veteran would but for what is now referred to as the "historic injustice" have applied for entry clearance earlier at a time when the present appellant was a minor child, and where that applicant would at that time have been granted entry clearance, then if the position is that there was still family life between that Gurkha veteran and his now adult child, by virtue of the "historic injustice" it would not (absent other reasons) generally be proportionate to refuse entry clearance now to that child. The crucial issue is whether or not Article 8(1) is now engaged. Mr Jesurum makes the point forcefully (and correctly) that that test is not a very high one; various issues which in other cases might go to whether it would be proportionate to refuse entry clearance will not apply in a Gurkha case, because the decisions of the Court of Appeal (affirmed in *Rai*) are such that the usual argument that the maintenance of a fair and effective system of immigration control is such a strong factor as to outweigh most other factors does not apply.

13. There are two other aspects of this appeal which I should consider at the outset and they are these. Although Mr Avery did not seek to persuade the Tribunal that even if I was persuaded that Article 8(1) was engaged I should nonetheless still dismiss the appeal having regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 (inserted by Section 19 of the Immigration Act 2014 with effect from 28 July 2014). This Tribunal is still obliged when making a decision to have regard to the factors set out within that Section because as is stated in terms at 117B,

with regard to Article 8 these are "public interest considerations applicable in all cases". I therefore cannot ignore it. However, I can dispose of consideration of Section 117B factors by adopting what was stated in clear terms by the Court of Appeal in *Rai* at paragraphs 55 to 57, where the court stated as follows:

> "*Section 117A and B of the Nationality, Immigration and Asylum Act 2002*
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> 55. With effect from 28 July 2014, section 117A of the Nationality, Immigration and Asylum Act 2002, requires that where a court or tribunal is considering the public interest, and whether an interference with article 8 rights is justified, it must have regard, in cases not involving deportation, to the matters set out in section 117B, including that the maintenance of effective immigration control is in the public interest (section 117B(1)), that it is in the public interest that those seeking entry into the United Kingdom speak English (section 117B(2)), and that it is in the public interest that those seeking entry be financially independent (section 117B(3)).
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> 56. Mr Jesurum pointed out that the Upper Tribunal judge did not consider the matters arising under those provisions of the 2002 Act. He submitted, however, that in view of the 'historic injustice' underlying the appellant's case, such considerations would have made no difference to the outcome, and certainly no difference adverse to him. Ms Patry submitted that if the Upper Tribunal's decision was otherwise lawfully made, the considerations arising under section 117A and B could not have made a difference in his favour.
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> 57. The submissions made on either side seem right. Certainly, if the Upper Tribunal judge's determination is in any event defective as a matter of law, which in my view it is, I cannot see how the provisions in section 117A and B of the 2002 Act can affect the outcome of this appeal."

14. In these circumstances, and on the facts of this case, although I have to have regard to the public interest considerations applicable in all cases within Section 117B, by reason of the "historic injustice" it is now effectively the position that in Gurkha cases where Article 8(1) is engaged, it cannot be said that "the maintenance of effective immigration controls is in the public interest", and in these circumstances as it is effectively conceded on behalf of the respondent that if this Tribunal were to find that Article 8(1) is engaged it would not be in the public interest to refuse the appellant entry clearance, there is no basis upon which a further consideration of Section 117B could affect what this court would in those circumstances be obliged to do, which is to allow this appeal.

15. Mr Jesurum also referred to what he understood to be the position of the respondent generally which was that in other cases they are believed to

be seeking permission to appeal decisions on the basis that notwithstanding the law as it is understood by both parties to be in this case, because Annex K has been added to the Secretary of State's policy subsequent to the decision in *Rai,* this somehow changes the position. I invited Mr Avery to argue this point if he wished to but he did not wish to do so and accordingly I do not deal with this argument because it is not part of the respondent's case before me and it is not appropriate to deal with submissions which have not been made.

16. Accordingly, I turn to deal with the evidence in this case. As I have already noted above, the appellant's parents both gave evidence affirming the truth of the statements they had made previously, and in the case of the appellant's father affirming the evidence contained in his latest witness statement. They were both cross-examined very fairly by Mr Avery, and it is right to say that the evidence which was given with regard to the appellant's life and condition and so on in Nepal was less full than it might have been. There are various gaps in the knowledge that this Tribunal has as to precisely how severe his condition is, for example, and also as to his day-to-day life. Although both the appellant's parents were asked repeatedly as to what is discussed in the telephone calls that are made, neither of his parents could go beyond asking him whether or not he was taking his medication and also how he very much wanted to come to this country because that was where his family life was. It is also right to say that there are minor (and I stress minor) inconsistencies in the accounts given with regard to the dates in particular of when the appellant finished studying or when precisely his current illness first manifested itself. However, the evidence that is given has been consistent on the fundamental points which are these. The appellant is ill. When aged about 25 he burst into tears at the prospect of his parents coming to settle in the UK. The appellant's father had to remain behind initially and leave for the UK later than he would have done to try and make the appellant more confident that everything would be done to bring him over when the appellant's parents could. The appellant's parents provide between them something like 40,000 Nepalese rupees per month for his support. Half of this is provided in payments sent by his mother (of which there is some evidence within the bundle) and the other half is provided by means of his father being paid part of his pension from the army into a Nepalese bank account over which the appellant has drawing rights. The appellant's father's evidence that when he cannot get hold of the appellant on the phone he is sufficiently concerned to try to get other people to contact him to ensure that he is alright was not challenged.

17. I do not propose to set out in this decision trite law with regard to what amounts to family life between a parent and an adult child, save to say that it is clear that it must go beyond what are referred to as "the normal emotional ties" to be expected between a parent and an adult child. Some guidance was given in *Rai* and in particular regard must be had (although this is not necessarily determinative, although it is important) to "dependence" and that includes financial and emotional dependence. However, as Mr Jesurum rightly points out the dependence does not have to be of necessity, what matters is the degree of dependence that there is.

In this case, having regard to all the evidence which is before the Tribunal, I find first that the appellant (who has never worked and who clearly has a psychiatric condition which makes working hard for him) is financially dependent on his parents. He is also, in my judgement, emotionally dependent on them to the extent that between them his family have made substantial visits to Nepal, the main purpose of which has been to ensure his wellbeing. These visits are far greater than one would "normally" expect in the case of an adult child. It seems to be the case, and I accept, that the appellant has only a very limited life beyond his relationship with his family who are in the UK. Certainly, on the balance of probabilities, it is far more likely than not that his life centres and revolves around his family in the UK and he sees himself still as part of that family as they still see him. I have regard of course to the fact that the appellant's father was discharged from the army with an "exemplary" record and was considered by his commanding officer as honest and reliable. Nothing in the evidence which was before me, both on the papers and orally, persuades me otherwise.

18. It is of course always a difficult decision to make as to the depth of a relationship between a child and his or her parents, and these decisions are always fact-sensitive, but I am quite satisfied, well-beyond the balance of probabilities, that in this case the relationship between this particular child and his parents goes way beyond that which one would describe as "normal" between an adult child and his parents. I am satisfied that the bond between this child and his parents has not been broken, that the appellant continues to rely on his parents both for emotional and financial support, and indeed his emotional life (whether by necessity or choice) remains centred on his parents. In these circumstances, as it is clear and conceded by the respondent that but for the "historic injustice" an application for settlement would have been made on his behalf at a time when it would have been granted, and as he currently still has a family life with his parents such that Article 8(1) is engaged, it is not proportionate to continue to exclude him from the UK.

19. It follows that his appeal must be allowed and I so find.

Decision

I set aside the decision of First-tier Tribunal Judge Geraint Jones QC as containing a material error of law, and remake the decision as follows:

The appellant's appeal is allowed, on human rights grounds, Article 8.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 30 April 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable

Signed:

Upper Tribunal Judge Craig Date: 30 April 2018