



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/00417/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 February 2015**

**Determination Promulgated  
On 14 May 2015**

**Before**

**THE HONOURABLE MRS JUSTICE THIRLWALL DBE  
UPPER TRIBUNAL JUDGE PINKERTON**

**Between**

**MISS NAMITA SHAHI  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr G Duncan of Counsel

For the Respondent: Mr I Jarvis

**REASONS FOR FINDING THAT THE TRIBUNAL MADE AN ERROR OF LAW,  
SUCH THAT ITS DECISION FALLS TO BE SET ASIDE**

1. The appellant is a citizen of Nepal who was born on 29 December 1988. Her father is a retired British Gurkha. He enlisted with the Brigade of Gurkhas in 1966. His certificate of service dated 22 May 1990 stated that his military conduct was exemplary and that he had completed 24 years loyal service in the British Army. The appellant's parents came to the UK in August 2011. She applied for entry clearance to settle in the UK with her parents. This was refused by the Entry Clearance Officer.

2. The appellant appealed the decision and her appeal was heard before First-tier Tribunal Judge Chohan on 30 September 2014. The appeal was dismissed. Grounds of Appeal are dated 20<sup>th</sup> November 2014.

### **The Permission Grant**

3. Permission to appeal was granted on the basis that:-

“It is arguable that there was a material error of law that could have made a material difference to the outcome for the reasons given in the application which I will not simply repeat”.
4. This is not an approved form of grant in this jurisdiction. The President of the Upper Tribunal (IAC) reiterated in **MR (permission to appeal: Tribunal's approach) Brazil [2015] UKUT 00029 (IAC)** that when granting permission to appeal to the Upper Tribunal, it is unsatisfactory merely to state that the applicant's grounds are arguable. The requirement, emphasised in **Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC)**, to engage with each and every ground of application, need not involve anything of an unduly elaborate, burdensome or analytical nature. The reasons for granting or refusing permission to appeal, in whole or part, in any given case will almost invariably be capable of being expressed in a concise and focused manner.
5. Stripped to their essentials the grounds are that the judge erred in law in
  - i) adopting a confused and incorrect approach to the proportionality exercise required under Article 8
  - ii) erroneously purporting to adopt a test of exceptionality (see paragraph 23)
  - iii) having found that there was family life between the appellant and her parents then found that she was living an independent life from her family, notwithstanding the fact that she is financially reliant on her father
  - iv) finding that family life could be maintained through visits and modern means of communication the judge failed to have any or any adequate regard to paragraph 113 of **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)**.

As a result he came to the wrong conclusion in dismissing the appeal.

### **Rule 24 Response**

6. A Rule 24 response dated 9 January 2015 refers to the judge noting that the parties have not lived together since 2005 when the appellant, 24 years of age at the date of decision, went to study dentistry in India and who leads an independent life. Essentially the respondent disagrees with the finding that there was family life.

7. Mr Jarvis explained that the respondent had also applied to the First-tier Tribunal out of time for permission to appeal in order to challenge the finding that family life is engaged. This struck us as an extraordinarily cumbersome procedure. Mr Jarvis explained that it was necessary in light of the decision in **EG and NG (UT rule 17: withdrawal; rule 24; scope [2013] UKUT 143**. He understood the decision to require a respondent to seek permission to appeal out of time where he seeks to uphold a decision for reasons other than those given by the FTT judge. That is not correct. The respondent is content with the decision of the FTT judge, but she disagrees with the route he took to reach his decision. Litigants are not permitted to appeal a decision with which they agree. We have reminded ourselves of the decision in **AN (Only loser can appeal) Afghanistan [2005] UKIAT 00097**. Given our ultimate conclusions in this case we have not asked the parties for their views on that decision. In our judgment the case the respondent wishes to advance here may properly be advanced by operation of Rule 24(3)(f). There is no need for a separate appeal to the FTT and, as we said at the hearing, the application for permission should be withdrawn. We understand that has now been done. We should add that Mr Duncan, for the appellant, did not seek to persuade us that a notice of appeal was necessary in order for us to consider the issue raised by the respondent.

### **The Law**

8. For the appellant to succeed in her application for entry clearance to settle in the United Kingdom as the adult dependent daughter of an ex-Gurkha soldier she had to satisfy all the requirements set out in paragraphs E-ECDR.2.1. to 3.2. of the Immigration Rules. It was not argued on behalf of the appellant that she was able to meet those Rules. There is no complaint about the FTT judge's finding that she could not satisfy the Rules. That decision was correct.
9. Her inability to meet the rules is not the end of the matter. Consideration also has to be given to the applicability of the respondent's policy as outlined in IDIs (Immigration Directorate Instructions) Chapter 15 Section 2A which is guidance provided in relation to applications for leave (in this case) as the child of a Gurkha discharged from service before 1 July 1997. 13.2 of those IDIs states as follows:-

#### **"13.2 Dependants over the age of 18**

Dependants over the age of 18 of foreign and Commonwealth HM Forces members (including Gurkhas) who are not otherwise covered in this guidance would normally need to qualify for settlement in the UK under a specific provision of the Immigration Rules.

In exceptional circumstances discretion may be exercised in individual cases where the dependant is over the age of 18.

..."

10. Also of relevance is Annex A of the IDIs which states as follows:-

**“Annex A**

**Discretionary Arrangements for Former Gurkhas Discharged Before 1 July 1997**

In May 2009 the Home Secretary announced that any Gurkha with more than four years service who had been discharged from the Brigade of Gurkhas before 1 July 1997 would be eligible for settlement in the UK.

Applications from former members of the Brigade of Gurkhas discharged before 1 July 1997 should be considered for the exercise of discretion under this guidance. These discretionary arrangements are supplementary to the existing provisions of the Immigration Rules.

This scheme recognises the unique nature of the service given by the Brigade of Gurkhas and is offered to them alone on an exceptional basis. It applies to those who served in the Brigade of Gurkhas from January 1948 when it became part of the British Army. Applications from former Gurkhas who were discharged before January 1948 should be considered on a case by case basis.

**Discretionary settlement criteria**

Settlement applications from former members of the Brigade of Gurkhas who were discharged before 1 July 1997 will normally be approved, provided the former Gurkha served for at least 4 years in the Brigade.

...

**Dependants**

Discretion will normally be exercised and settlement granted in line with the main applicant for spouses, civil partners, unmarried and same-sex partners and dependant children under the age of 18.

Children over the age of 18 and other dependent relatives will not normally qualify for the exercise of discretion in line with the main applicant and would be expected to qualify for leave to enter or remain in the UK under the relevant provisions of Article 8 of the Human Rights Act. Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see Section 13.2.”- (13.2 is set out at paragraph 9 above).

11. Thus, in order to succeed the appellant must show that exceptional circumstances apply in accordance with the policy or that she can succeed under Article 8 ECHR. Otherwise the appeal will fail. As to the policy the Court of Appeal in **Gurung & Ors [2014] EWCA Civ 8** at paragraph 22 said this:-

“22. It is inherent in any policy which permits a departure from a general rule in exceptional circumstances that there may legitimately be scope for different views as to whether there are exceptional circumstances on the facts of a particular case. There is implicit in the exercise of any discretion the risk that different decision-makers can legitimately make different decisions on what appear to be indistinguishable facts. The range of reasonable (and therefore legitimate) responses may be wide. This is the inevitable consequence of giving a decision-maker a discretion. But that does not mean that a discretionary rule or policy is unlawful on grounds of uncertainty.”

At paragraph 26 of **Gurung**:-

“26. ... Mr Drabble submits that the purpose of the policy is to facilitate the settlement in the UK of the families of Gurkha veterans. But the purpose of the policy as regards adult dependant children is clearly stated on the face of the policy itself and it is far narrower than this. It draws a clear distinction between dependant children who are under 18 and those who are over that age. The purpose of the policy is not to facilitate the settlement in the UK of adult dependant children. The policy recognises that such children may be granted leave to enter under Rule 317(i)(f) and if Article 8 requires it. Otherwise, they are not granted leave to enter unless there are exceptional circumstances. This policy objective is not inconsistent with any broader policy statement. We reject the submission that it is unlawful on the grounds that it frustrates the purposes of the policy.”

12. There is then a discussion from paragraph 27 onwards in **Gurung** about the historic injustice and Article 8(2) of the ECHR. At paragraph 35:-

“35. It is accepted on behalf of the SSHD that the historic injustice is a relevant factor to be taken into account when the proportionality balancing exercise is undertaken. The question is what weight should be given to it. Normally, questions of weight are a matter for the decision-maker and the court does not intervene except on well-established public law grounds. But the present appeals raise the point of principle whether the historic injustice suffered by Gurkhas should be accorded limited or substantial weight in the Article 8(2) balancing exercise.”

13. Then, at paragraph 38:-

“38. We accept the submission of Ms McGahey that the historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. It is not necessarily determinative. If it were, the application of every adult child of a UK-settled Gurkha who establishes that he has a family life with his parent would be bound to succeed. Mr

Drabble does not contend for this extreme position and it is not supported by the approach adopted in the BOC cases to which we have referred.”

14. At paragraph 42:-

“42. It follows that we do not accept the submission of Mr Drabble that the weight to be given to the historic injustice in the Gurkha cases is just as strong as the weight to be given to the injustice caused to the BOCs. The fact that the right to settle enjoyed by Gurkhas is less secure than that enjoyed by the BOCs is a relevant factor. But it also follows that we do not agree with the UT that the weight to be given is generally ‘substantially less’ in the Gurkha cases. If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now. To that extent, the Gurkha and BOC cases are similar. That is why we cannot agree that, as a general rule, the weight accorded to the injustice should be substantially different in the two cases.

43. ... The flexibility of the ‘exceptional circumstances’ criterion is such that it does not require the historic injustice to be taken into account at all. It certainly does not prescribe the weight to be given to the injustice, if indeed it is to be taken into account. The requirement to take the injustice into account in striking a fair balance between the Article 8(1) right and the public interest in maintaining a firm immigration policy is inherent in Article 8(2) itself, and it is ultimately for the court to strike that balance. This requirement does not derive from the fact that the policy permits an adult dependant child to settle here in exceptional circumstances. Accordingly, we reject this additional reason given by the UT for holding that the weight to be given to the historic injustice is limited.”

15. There is then further discussion as to what constitutes family life and the point is made that ultimately the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case. The Court of Appeal accepted that as a matter of law in some instances an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents. It all depends on the facts. **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)** at paragraphs 50-62 is recognised as containing a useful review of some of the jurisprudence and the correct approach to be adopted in relation to decisions relating to Article 8 family life.

16. We have reminded ourselves of the decision of the Court of Appeal in **Patel v ECO Mumbai [2010] EWCA Civ 17**. As Sedley LJ said:-

“You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and Article 8 will have no purchase.”

### **The judge’s findings (paragraphs 11-23)**

17. We regret we do not find this section easy to follow. It begins with short references to two of the relevant authorities and a summary of some law at paragraph 13. The paragraph concludes “it seems that if the respondent can point to matters over and above the public interest in maintaining a firm immigration policy which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the respondent’s favour”. So far as we can tell there was no argument to that effect here.
18. The judge then moves to a formulaic reference to the principles set out in **Beoku Betts [2008] UKHL 39** and to “the proportionality exercise as laid down in **Razgar [2004] UKHL 27.**” He says no more about how (or even whether) he has applied them.
19. In paragraph 15 the judge set out the following matters:
  - The sponsor and his wife had been in the UK for 3 years. During that time the appellant was in India
  - The appellant had been separated from the sponsors since 2005 because she was studying in India
  - The appellant had visited her parents in Nepal but the overall period of separation was 8 years (as at the date of hearing in December 2014).
20. The judge concluded the paragraph thus “Nevertheless bearing in mind the nature of the relationship I am prepared to accept that there is a family life”. This might strike the reader as surprising in light of the three points to which we refer in paragraph 19 above but the judge made further findings in his paragraph 16 having said “I further find that such interference would have consequences of such gravity as potentially to engage the operation of article 8.” The interference is not identified but the judge must have meant refusal of leave. In the same paragraph and we think by way of explanation of his finding in relation to family life he found that “bearing in mind the nature of the relationship, I am prepared to accept that there are genuine emotional ties and that the appellant to some degree has been reliant on her father financially.”
21. The evidence appears to have been that the sponsor was the appellant’s sole means of financial support (see paragraph 4). In paragraph 17 the judge finds first that the appellant was financially reliant on her father and, three lines later, that she is reliant upon him financially “to some degree”. This is then repeated in paragraph 20. It is not clear what the judge

meant. Either the appellant is or is not financially reliant on her father. The fact that she was living separately from her parents for most of the time did not mean that she was independent of them. It is not clear that the judge took that into account when coming to his conclusions as to the nature of the family life here.

22. We entirely understand why both the appellant and the respondent are dissatisfied with this decision. Having concluded that there was family life the judge seems to dilute his own findings to the point where it is not clear whether he was satisfied that there was family life here at all - but he did not go as far as to say that the bonds were broken (unlike in **Patel** above). Then, having correctly accepted that there was a historic injustice and it was a factor to be taken into account it is not clear that he took it into account. Having said earlier that more was required from the respondent than the public interest in maintaining a firm immigration policy he concluded that "interference in the appellant's family life is necessary in the interests of maintenance of effective immigration policy".
23. It may well be that the decision the judge came to is correct but we have spent some considerable time since the hearing reviewing this decision. We are unable to say that the reasoning is sufficient to explain, still less justify, any of the conclusions. There is nothing to be gained from any further analysis of the decision.
24. We are satisfied that there were material errors of law. We quash the decision. We remit the case to the FTT for a fresh hearing. None of the findings of the FTT shall stand. No anonymity direction is made. There has been no application for one and the circumstances do not warrant such a direction being given.

Signed

Date 7 May 2015

Upper Tribunal Judge Pinkerton