



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

Appeal Number: OA/02869/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 8th December 2015

On 21st December 2015

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, New Delhi

Appellant

and

Biswas Pun

(no anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Staunton, Senior Home Office Presenting Officer

For the Respondent: Mr Howells, NC Brothers & Co Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Nepal born on the 8th July 1983. On the 28th May 2015 Judge Andrews of the First-tier Tribunal allowed his appeal, on human rights grounds, against a decision to refuse to grant him entry clearance as an adult dependent relative. The Entry Clearance Officer now has permission to appeal against that decision¹.

¹ Permission granted on the 20th August 2015 by First-tier Tribunal Judge Ransley

2. The basis of the Respondent's claim is set out in his witness statement dated 3rd November 2014. He wishes to come to live in the UK with his father, Mr Tikajit Pun, an ex-Gurkha who has now been granted British citizenship. Tikajit Pun came to live in the UK in 2006 after being granted Indefinite Leave to Enter. The Respondent and his mother applied to come to settle with him, but were refused. The family were without funds to pursue an appeal. The Respondent's mother was subsequently granted leave to enter and came here to join her husband in 2008. The Respondent states that since his mother left Nepal he has been suffering from depression and has had to receive hospital treatment in respect of his mental health. His parents, and sometimes friends, contribute to paying for his medical bills. The Respondent has always been financially dependent on his father and until his mother came to the UK, had never lived alone. He has never worked or been independent of his parents. When his mother discovered that he was suffering from mental illness she returned to Nepal to be with him. She continues to look after him.
3. The Entry Clearance Officer noted that the Respondent was, at the date of the application, 30 years old. He had not demonstrated that he could meet the requirements of the Rules as set out in Appendix FM; nor had he shown there to be exceptional circumstances which would justify his admission on Article 8 grounds.
4. When the matter came before the First-tier Tribunal Mr Tikajit Pun attended to give oral evidence. It does not appear that his evidence was materially challenged by the Entry Clearance Officer and the determination proceeds on the basis that it is true. The First-tier Tribunal finds
 - a) That there continues to be a family life between the Respondent and his mother, and he remains financially dependent upon his father. That dependency is in part because of his illness and in part because this is the 'cultural norm' in Nepal;
 - b) There is a family life between the Respondent's parents;
 - c) The only reason that she is in Nepal, rather than in the United Kingdom with her husband, is because of the Respondent's illness;
 - d) Apart from his mother the Respondent has no relatives to whom he can turn in Nepal;
 - e) In the circumstances the decision is not proportionate.

The appeal is allowed on Article 8 grounds.

Error of Law

5. The Entry Clearance Officer now complains, in essence, that the

determination did not contain a complete Article 8 assessment.

6. It is a complaint with justification. Although I find that it was open to the Tribunal to find that this 31 year old man remained dependent on his parents due to a combination of social, personal and economic factors, this determination does not contain even passing reference to the public interest or to Part 5 of the Nationality, Immigration and Asylum Act 2002. Paragraph 21 reads: "I am satisfied that there is more than the usual emotional ties between the Appellant, the sponsor and the Appellant's mother and as such, they enjoy a family life together. Given this I am satisfied that on the facts of this case the decision of the Respondent is a disproportionate one". The Tribunal has here failed to give reasons. The finding that there is a family life does not make the decision disproportionate.
7. I am satisfied that the proportionality assessment in this determination is incomplete. The findings of fact are otherwise preserved.

The Re-Making

8. For the avoidance of doubt I find that there is a family life between the Respondent and his parents. He has produced some medical evidence of mental illness and the First-tier Tribunal accepted that for cultural, social and economic reasons he remained heavily dependent on both his mother and father, albeit both performing different roles in his life.
9. I am satisfied that the decision to refuse entry clearance is capable of engaging Article 8 in that it was result in an ongoing interference with, or lack of respect for, the Respondent's family life with his parents, and they with each other.
10. The decision is taken in pursuit of the legitimate policy objective of protection of the economy and it is one that was lawfully open to the Entry Clearance Officer to take.
11. I now address proportionality.
12. In his submissions Mr Howells relied squarely on the 'historical injustice' suffered by Gurkha servicemen who were not permitted to settle in the United Kingdom upon discharge from the British Army. He relied on the decision of the Court of Appeal in Gurung [2013] EWCA Civ 8 and that of the Upper Tribunal in Ghising (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), the headnote of which reads:
 - (1) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by

British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.

(2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).

(3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.

(4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.

(5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. 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. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance.

13. Mr Howells referred me to the witness statement of Mr Pun wherein he confirms that he was discharged from the British Army in 1991 when his son was only eight years old. Mr Pun avers that had he been able to do so, he would have come to live in the United Kingdom then, and brought his wife and son with him. That this is so is demonstrated by the fact that as soon as he was granted indefinite leave to enter he did so, and sought permission for his wife and son to join him here. The Respondent was a minor at the time that his father was discharged, and I am satisfied that Mr Pun would have brought him to the UK with him.
14. Mr Staunton relied on the Notice of Refusal and made no further submissions.

15. The ECO took the view that the applicant, as he then was, had not demonstrated that his father would have availed himself of the opportunity to settle in the UK upon discharge from the Army, had that opportunity been available to him. I am satisfied, on the evidence before me, that this has been shown. Mr Pun has sworn an unchallenged witness statement to that effect, and as Mr Staunton rightly states, illustrated his desire to move to the UK as soon as he was able to do so by getting on a plane. I am satisfied that but for the historic wrong, the Respondent would have been settled here as a child. As Gurung and Ghising [2013] note, this will ordinarily be sufficient to outweigh the public interest in maintaining immigration control. Mr Staunton did not seek to persuade me that there was any countervailing factor, such as a poor immigration history or criminality, that would be capable of displacing that presumption. For those reasons the appeal must be allowed.

Decisions

16. The determination of the First-tier Tribunal contains an error of law and it is set aside.
17. I re-make the decision by allowing the appeal on Article 8 grounds.
18. I was not asked to make an anonymity direction and on the facts I see no reason to do so.

Upper Tribunal Judge Bruce
8th December 2015