



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/18825/2013

THE IMMIGRATION ACTS

Heard at Field House
On 18 December 2014

Decision & Reasons Promulgated
On 8 January 2015

Before

**THE HONOURABLE MRS JUSTICE S. CARR DBE
DEPUTY UPPER TRIBUNAL JUDGE I.A. LEWIS**

Between

**TIRTHA BAHADUR PUN
(ANONYMITY ORDER NOT MADE)**

Appellant

and

**ENTRY CLEARANCE OFFICER,
NEW DELHI**

Respondent

Representation:

For the Appellant: Ms R Stickler, Counsel instructed by N.C. Brother & Co Solicitors
For the Respondent: Mr L Tarlow Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Ghani promulgated on 26 June 2014 dismissing the appeal of the Appellant, Mr Tirtha Bahadur Pun, against the decision of an Entry Clearance Officer in New Delhi dated 20 September 2013 to refuse to grant entry clearance to settle as the adult dependent son of his father, Mr Dil Bahadur Pun.

2. The Appellant is a national of Nepal born on 15 September 1988. His father is a former member of the British Army's Brigade of Gurkhas having served for just over fifteen years from November 1974 and being discharged with the highest categorisation of military service - 'exemplary'. The Appellant's father was granted indefinite leave to remain in the United Kingdom in January 2007 and is thereby settled here.
3. The instant application to join his father is not the Appellant's first such application. An earlier application had been made in July 2009 and refused on 12 January 2010. An appeal against that decision was in due course withdrawn by the Appellant. The Appellant's mother and sister, however, were both granted entry clearance: the sister arrived in October 2010 and the mother arrived in April 2011. It is said that the decision to withdraw the Appellant's appeal at that time was based on poor legal advice. Since that time the Appellant remained in Nepal, living in his father's house, and was financially supported by his father whilst he continued studies.
4. On 26 July 2013 the Appellant applied again for entry clearance to join his father in the United Kingdom. The application was refused on 20 September 2013 for reasons set out in a Notice of Immigration Decision of that date with reference to paragraph EC-DR.1.1 of Appendix FM and in particular E-ECDR2.4, also with reference to the Secretary of State's policy for dependants over the age of 18 of Foreign and Commonwealth and other HM Forces members as described in IDI, Chapter 15, section 2A. Reference was also made in the decision to Article 8 of the European Convention on Human Rights.
5. The Appellant appealed to the Immigration and Asylum Chamber. The appeal was dismissed for the reasons set out in the First-tier Tribunal Judge's Decision and Reasons.
6. Before Judge Ghani it was accepted on behalf of the Appellant that he did not meet the requirements of the Immigration Rules, and that the relevant policy had been applied by the Respondent's decision-maker: see the determination of Judge Ghani at paragraph 13. Accordingly, before the First-tier Tribunal, the Appellant placed reliance on Article 8.
7. At paragraph 13 of the decision of the First-tier Tribunal the Judge directed herself to relevant case law including Razgar, and at paragraph 14 she made reference to the cases of Kugathas and S v United Kingdom in the following terms:

*“The first question therefore is whether or not the Appellant enjoys private or as the case may be family life with his father and mother. In the case of **Kugathas [2003] EWCA Civ 31** Arden LJ said “there is no presumption of family life, in my judgment a family life is not established between adult child and his surviving parent or other siblings unless something more exists than normal ties”. In the case of **S v United Kingdom [1984] 40 DR196** it was stated “generally the protection of family life under Article 8 involves cohabiting dependants such as parents and their children, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationship between adults, a mother and her 33 year old son in the present case, would not necessary acquire the protection of Article 8 of the Convention without evidence of further elements of dependency involving more than normal emotional ties”.”*

We note there the reference to the ‘circumstances of the particular case’. This emphasises that the issue under Article 8(1) is fact-sensitive, which is also very much the emphasis in the review of jurisprudence in the case of **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)** to which we will return in due course. (Hereafter to avoid confusion with another case with a similar title we shall refer to this case as **Ghising [2012]**.)

8. The Judge then said this at paragraph 15:

“I accept that the Appellant has throughout his life been dependent financially on his father. I also find that this is a norm as far as the Appellant’s culture is concerned. The Appellant is now over the age of 25 and is currently a student studying Management. He suffers from asthma but this is a long standing condition which has been managed with medication. The appellant did make a previous application which was refused in 2010 and the appeal withdrawn. At that time he was aged 21. The Appellant’s father was granted indefinite leave to remain on 15 January 2007. His mother arrived in the UK on 19 April 2011 and his sister came to the UK on 29 October 2010. The Appellant’s father stated in his evidence that if and when the Appellant falls ill, his aunt would come to his assistance. Furthermore, the Appellant lives with a tenant in family home. The aunt only lives about 25 minutes away. The Appellant’s father accepted that he went back to Nepal in 2008 but this was only because his father passed away. If his father had not passed away he would not have visited. The Appellant’s mother has not returned to Nepal since her arrival. Despite the Appellant’s evidence that they are extremely worried for the Appellant’s well-being and that he is alone etc., I find it somewhat incredible that both parents have not chosen to visit the Appellant. There cannot be said to be any meaningful relationship between the Appellant and his parents other than the Appellant being their son and they being culturally bound to maintain him financially. The Appellant has shown over a substantial period of time that he can manage fully without his parents despite his medical condition. His medical condition cannot be said to be an exceptional factor. I therefore find that Article 8 is not engaged in the Appellant’s case.”

9. The Judge went on to consider at paragraphs 16 and 17 in the alternative the issue of proportionality. In the event we have found it unnecessary for us to consider that aspect of the Judge's reasoning. Had it been necessary for us to do so, undoubtedly we would have been influenced by the decision in **Ghising and Others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)** - (hereafter **Ghising [2013]**).
10. The Appellant having lost his appeal against the First-tier Tribunal sought permission to appeal to the Upper Tribunal which was initially refused by the First-tier but was granted by Upper Tribunal Judge Eshun on 18 November 2014.
11. The Respondent has filed a Rule 24 Notice resisting the appeal dated 24 November 2014.
12. Before us the focus of the Appellant's challenge to the decision of the First-tier Tribunal is, as inevitably it must be, on the judge's finding that Article 8 is not engaged - that in other words the case fell at the first of the **Razgar** questions.
13. The Appellant's grounds in support of the application for permission to appeal which have been adopted and expanded upon by Ms Stickler before us today essentially raise three bases of challenge.
14. The first ground of challenge is that in assessing whether the relationship between the Appellant and his father went beyond the usual emotional ties, the Judge failed to have any regard to what is described as 'Gurkha specific considerations' (Grounds at paragraph 4(i)), and in particular the historic injustice suffered by Gurkha veterans as identified in the case of **Ghising [2013]**.
15. The second ground of challenge contends that the Judge erred in law in failing to consider the Appellant had not established an independent life when considering the question of family life as between the Appellant and his father.
16. The third basis of challenge is again heavily reliant upon the decision in **Ghising [2013]** to the effect that had there been family life between the Appellant and his father it would have ordinarily resulted in a favourable outcome on an application for entry clearance such as the Appellant had made.

17. We consider that the first ground of challenge is misconceived. We have drawn to the attention of the Appellant's representative the case of **JB (India) [2009] EWCA Civ 234**. In that case the historic injustice was in the context of British overseas citizens. At paragraphs 20 and 21 of the judgment of Lord Justice Sullivan the following is said:

"20. Counsel for the appellants laid great stress on the historical wrong which had deprived the sponsor of a right of abode in the United Kingdom by legislation which had been acknowledged to be racially discriminatory and then further discriminated against her on account of her sex because married women could not apply for vouchers under the special quota voucher scheme unless their husbands were incapacitated. The history of the special quota voucher scheme and its application to the sponsor and her family is set out in some detail in the reconsideration determination and it is unnecessary to repeat it in this judgment. The decisions in NH and RO are authority for the proposition that, where there is an interference with family life sufficient to engage Article 8(1), recognition that the family has been the victim of a 'historic injustice' may well be relevant, in some cases highly relevant, when the proportionality of that interference is considered under Article 8(2), but, as the Tribunal said on reconsideration in the present case: 'first it must be shown that there is family life for the purposes of Article 8, and that the interference with it (or lack of respect for it) is sufficiently serious to engage the potential operation of Article 8'.

21. The historic injustice has no bearing on the question whether, in 2007, these three adult appellants and their mother were not simply members of the same family but were enjoying what could sensibly be described as family life for the purposes of Article 8. There is no reason to doubt Immigration Judge Parker's conclusion that in 1992, when the appellants were aged 19, 17 and 10, and were living with their mother in India they were dependent upon her at that time even though the eldest appellant was just an adult. But, as with all families, circumstances changed as the children grew older. By 2007, when the relevant application for entry clearance was made, the appellants were 33, 31 and 24 years old. They had been separated from their mother since 2001 and, as the tribunal said on reconsideration, it was clear that the appellants did not need their mother to be with them."

We pause to add that the references to the cases of NH and RO are references to **Entry Clearance Officer Mumbai v NH (India) [2007] EWCA Civ 1330** and **RO (India) v Entry Clearance Officer [2008] EWCA Civ 1525**.

18. Whilst it may well be the case that factual distinctions can be drawn between the circumstances of the appellant in **JB (India)** and the circumstances of the Appellant in the case before us, that does not detract from the central point made at paragraph

21 that the “*historic injustice*” has no bearing on the question of family life as it exists at the relevant date of the decision.

19. The second basis of challenge brought on behalf of the Appellant really comes down to the question of whether the Judge’s analysis at paragraph 15, and conclusion that there no longer existed family life as between the Appellant and his parents, was adequate against the established jurisprudence.
20. In this context we note that the Judge had regard to two authorities at paragraph 14 to which we have already made reference. We have also had consideration to the exploration of the jurisprudence set out in **Ghising [2012]** which was itself approved and endorsed by the Court of Appeal in **Gurung and Others [2013] EWCA Civ 8** at paragraph 46. In this context we have noted in particular paragraphs 50-62 of the decision in **Ghising [2012]**:

“50. The ECtHR has established that, from birth, a child has a bond with his parents which amounts to “family life”, which remains in existence despite voluntary separation (see Sen v Netherlands (2003) 36 EHRR 7; (1996) Gul v Switzerland 22 EHRR 93).

51. The question which arises in this case is at what stage does the child/parent bond of family life come to an end? When does an adult child cease to enjoy family life with his parents, for the purposes of Article 8?

52. The authority most frequently cited on this point is Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. We observe at the outset that the facts in Kugathas were strikingly different from the facts in this case. Mr Kugathas was a national of Sri Lanka, aged about 38, who had moved to Germany with his mother and siblings, as refugees, about 17 years earlier. Mr Kugathas had been living on his own in the UK for about 3 years, and the only contact he had had with his family was one visit of 3 weeks duration from his sister, her husband and child, and periodic telephone calls. The Court of Appeal held that he did not enjoy family life with his family in Germany, within the meaning of Article 8(1).

53. In Kugathas, at [14], Sedley LJ cited with approval the Commission’s observation in S v United Kingdom (1984) 40 DR 196:

“Generally the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.”

54. Sedley LJ accepted the submission that ‘dependency’ was not limited to economic dependency, at [17]. He added:

“But if dependency is read down as meaning “support” in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, “real” or “committed” or “effective” to the

word “support”, then it represents in my view the irreducible minimum of what family life implies.”

55. Arden LJ said , at [24] – [25]:

“24. There is no presumption that a person has a family life, even with the members of a person’s immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.

25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties... Such tie might exist if the appellant were dependent on his family or vice versa.”

56. *We accepted the Appellant’s submission that the judgments in Kugathas had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts.*

57. *It has been recognised that family life may continue between parent and child even after the child has attained his majority: see Etti-Adegbola v Secretary of State for the Home Department [2009] EWCA Civ 1319, per Pill LJ at [23]; per Arden LJ at [35].*

58. *In Secretary of State for the Home Department v HK (Turkey) [2010] EWCA Civ 583, the Court of Appeal (which included Sedley LJ in its constitution) considered the judgments in Kugathas and Sir Scott Baker said, at [16]:*

“In my judgment Mr Sachdeva is seeking to read more into these passages than is warranted ... it is apparent that the respondent had lived in the same house as his parents since 1994. He reached his majority in September 2005 but continued to live at home. Undoubtedly he had family life while he was growing up and I would not regard it as suddenly cut off when he reached his majority.”

59. *In RP (Zimbabwe) & Anor v Secretary of State for the Home Department [2008] EWCA Civ 825, [6] Sedley LJ said it would be ‘unreal’ to dispute that the 23 year old appellant enjoyed family life with her parents when she “had lived pretty well continuously with her parents and siblings all her life”. The Court of Appeal also found the second appellant, who was 25 years old, enjoyed family life with his parents since he was “economically and emotionally .. a member of his immediate family, all of whom – that is his parents and his two sisters – are now lawfully resident here” (at [8]).*

60. *Academic commentators on Strasbourg judgments have observed that the Commission has been more cautious in its acceptance of family life between parents and adult children than the Court: Clayton & Tomlinson: The Law of Human Rights 2nd ed. (2009) paragraph 13.143 -144; Liddy: The concept of family life under the ECHR European Human Rights Law Review 1998,1, 15-25. Certainly, some of the Court’s decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence. For example:*

- a. *Boughanemi v France* (1996) 22 EHRR 228. The ECtHR held that the deportation of a 34 year old man was an interference with his family life with his parents and siblings although he no longer lived with them.
 - b. *Bouchelkia v France* (1998) 25 EHRR 686. The ECtHR held that a deportation order interfered with the family life of a 20 year old man living with his parents and siblings.
 - c. *Kaya v Germany* (Application no 31753/02). The ECtHR held that a young adult who had lived with his parents until he was sent to prison in 1999 still enjoyed family life with them on his deportation in 2001, as he had kept in touch with his family through visits and letters.
61. Recently, the ECtHR has reviewed the case law, in *AA v United Kingdom* (Application no 8000/08), finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. The Court said, at [46] – [49]:

“46. The Court recalls that in *Bouchelkia v France*, 29 January 1997, § 41 Reports of Judgments and Decisions 1997, when considering whether there was an interference with Article 8 rights in a deportation case, it found that “family life” existed in respect of an applicant who was 20 years old and living with his mother, step-father and siblings. In *Boujlifa v France*, 21 October 1997, § 36, Reports 1997-VI, the Court considered that there was “family life” where an applicant aged 28 when deportation proceedings were commenced against him had arrived in France at the age of five and received his schooling there, had lived there continuously with the exception of a period of imprisonment in Switzerland and where his parents and siblings lived in France, In *Maslov*, cited above, § 62, the Court recalled, in the case of an applicant who had reached the age of majority by the time the exclusion order became final but was living with his parents, that it had accepted in a number of cases that the relationship between young adults who had not founded a family of their own and their parents or other close family members also constituted “family life”.

47. However, in two recent cases against the United Kingdom the Court has declined to find “family life” between an adult child and his parents. Thus in *Onur v United Kingdom*, no. 27319/07, § 43-45, 17 February 2009, the Court noted that the applicant, aged around 29 years old at the time of his deportation, had not demonstrated the additional amount of dependence normally required to establish “family life” between adult parents and adult children. In *A.W. Khan v United Kingdom*, no. 47486/06, § 32, 12 January 2010. the Court reiterated the need for additional elements of dependence in order to establish family life between parents and adult children and found that the 34 year old applicant in that case did not have “family life” with his mother and siblings, notwithstanding the fact that he was living with them and that they suffered a variety of different health problems. It is noteworthy, however, that both applicants had a child or children of their own following relationships of some duration.

48. Most recently, in *Bousarra*, cited above, § 38-39, the Court found “family life” to be established in a case concerning a 24 year old applicant, noting that the applicant was single and had no children and recalling that in the case of young adults who had not yet founded their own families, their ties with their parents and other close family members could constitute “family life”.

49. An examination of the Court’s case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own can be regarded as having “family life”. “

62. *The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). As Wall LJ explained, in the context of family life between adult siblings:*

*“We do not think that *Advic* is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life it is sought to establish is that between adult siblings living together. In our judgment, the recognition in *Advic* that, whilst some generalisations are possible, each case is fact-sensitive places an obligation on both Adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that Article 8 is or is not engaged in a given case.” (*Senthuran v Secretary of State for the Home Department* [2004] EWCA Civ 950).”*

21. We consider that the First-tier Tribunal Judge did exactly what is suggested in the final passage above at paragraph 15 of her decision. In our judgment this does indeed constitute a short and succinct explanation of why Article 8 was considered on the very particular facts of this case not to be engaged.

22. We have in reaching this decision also had regard to the submissions made with reference to the decision in **Pun and Others (Gurkhas: policy: Article 8) Nepal [2011] UKUT 00377 (IAC)**. Ms Stickler directed our attention in particular to what was said in that decision about financial dependency at paragraph 24. Paragraph 24 is in these terms:

*“The need for an evaluation of the facts of each particular case seems to us to provide the answer to Mr Blundell’s submission that when assessing article 8 any financial dependence should be of necessity not choice by analogy with a similar requirement to the assessment of dependency under the Rules. Even if such an approach is required under the Rules, and it does seem to us that this may be an over-simplification of what the court was saying in **Bibi**, it would be wrong to impose such a limitation when assessing dependency within article 8. Each case must be looked at on its own facts. We certainly accept that a contrived dependency will carry little, if any, weight within article 8 either when deciding whether family life exists or when assessing proportionality, but if financial dependency is of choice to the extent that an applicant is dependent so that he or she can pursue further studies this should not without more mean that such a dependency cannot properly be taken into account.”*

23. It seems to us that the passages there cited offer further guidance as to the approach to be taken in such cases as the current case but again emphasise the need for a case-by-case approach. We do not consider that there is anything declarative or imperative in paragraph 24 of **Pun** that obliged the Judge to conclude in this particular appeal that because the Appellant was still being supported by his father

family life existed. In our judgment the Judge gave adequate reasons for explaining why he did not consider that to be the case, notwithstanding the fact of the financial dependence which the Judge clearly had in mind. In those circumstances we find that there is nothing of substance in the challenge to the judge's conclusion in respect of Article 8(1).

24. The final ground of challenge is premised on the existence of family life and has no determinative value in isolation. Having rejected the first two grounds we find that the third ground is therefore without foundation.
25. Accordingly, in all of the circumstances, we find that the Judge made no material error of law. The decision of the First-tier Tribunal stands and Mr Pun's appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis Dated: 6 January 2015