



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

Appeal Number: OA/15613/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Determination**

**On the 19<sup>th</sup> September 2014**

**Promulgated**

**On 6<sup>th</sup> October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

**THE ENTRY CLEARANCE OFFICER - NEW DEHLI**

Appellant

**and**

**MISS CHINU GURUNG**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: Mr R Jesurum, Counsel instructed by Howe and Co

**DETERMINATION AND REASONS**

*Introduction*

1. The respondent to this appeal is a citizen of Nepal who was born on the 2<sup>nd</sup> January 1981. The Entry Clearance Officer (ECO) appeals against the decision of the First-tier Tribunal (Judge Parker, sitting at Taylor House) who allowed her appeal against the decision to refuse her application for entry clearance as the adult dependent daughter of a retired Gukha soldier who is settled in the United Kingdom.
2. In refusing the respondent's application, the ECO concluded that the appellant could not meet the requirements for entry clearance under

Section EC-DR of Appendix FM of to the Immigration Rules because, (i) she did not, as a result of age, illness or disability, require long-term personal care to perform everyday tasks [EC-ECDR.2.1] and, (ii) there was no evidence that she could be adequately maintained, accommodated and cared for in the UK by her father without recourse to public funds [EC-ECDR.3.1]. The ECO therefore turned to consider the Secretary of State's policy concerning adult dependent relatives of Foreign and Commonwealth and HAM Forces (Immigration Directorate Instructions: Chapter 15, Section 2A). However, s/he concluded that there were no exceptional circumstances in the respondent's case. In particular, the ECO noted that the appellant was aged 32 years and, that whilst she was being financially supported by her father, this was only because she was still undertaking full-time study. S/he thus concluded that there was nothing beyond the normal relationship of parent and adult child. Whilst the military covenant was a relevant consideration, it did not override the requirements of the Immigration Rules. Her father had not had any expectation that he would be entitled to settle in the United Kingdom when he retired, and the decision to allow him to do so was in recognition of his military service. Her father was not however obliged to reside in the UK. Therefore, if the respondent wished to join him in the UK, she would either have to meet the requirements of the Immigration Rules or bring herself within the ambit of the published policy.

3. Although he did not expressly say so, the judge appears to have accepted that the respondent could not meet the requirements of the Immigration Rules, for the reasons given by the ECO. He did however consider whether the decision to refuse her application for entry clearance was compatible with her right to respect of for private and family life under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. He concluded that it was not. The ECO now challenges that conclusion on a number of grounds, to which I now turn.
4. Paragraphs 4 to 10 of the grounds argue that the Judge's approach to the Article 8 assessment was fundamentally flawed, in that he failed to adopt the approach in Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 by asking whether there were "compelling circumstances" that were not recognised by the Immigration Rules, before considering the case under Article 8. The grounds further argue that, had he asked himself that question, the judge would have been bound to conclude that there were no such circumstances and thus to have realised that it was unnecessary to consider Article 8 at all. However, Mr Whitwell did not pursue this argument. He instead accepted the force of Mr Jesurum's argument; namely, that the Immigration Rules do not provide any express mechanism for taking account of the 'historic injustice' suffered by veterans of the Brigade of Gurkhas who were discharged before 1997 and thus deprived of an opportunity to settle in the United Kingdom. Mr Whitwell did however maintain the other grounds, to which I now turn.

5. The remaining 11 substantive paragraphs of the grounds of appeal can effectively be distilled into three discrete arguments. Firstly, the judge erred in finding that there was family life at all. Secondly, there was no evidence to support the judge's finding that the 'historic injustice' suffered by the respondent's father was what had led to her remaining in Nepal following her father's move to and settlement in the United Kingdom. Thirdly, even if the judge was right to make the link between the historic injustice and the respondent's current situation, he was wrong to treat that factor as being determinative of the appeal. I will consider these arguments in turn.
6. The argument that the judge erred in finding that family life existed between the adult respondent and her father is founded upon the well-known decision of the Court of Appeal in Kugathas v SSHD [2003] EWCA Civ 31. It was held in that case that family life is not established between an adult child and a surviving parent or sibling unless something more exists than normal emotional ties. However, I am satisfied that this argument amounts to nothing more than a disagreement with a conclusion that was reasonably open to the judge upon evidence that was undisputed in the First-tier Tribunal. It was an accepted fact that the respondent had remained financially dependent upon her father due to her continuing to be in full-time education. Moreover, the Court of Appeal in Kugathas recognised that family ties might exist "if the appellant were dependent on his family or vice versa" [emphasis added]. The grounds are thus wrong to suggest that the Court "felt that it was clearly necessary to confine Article 8 to situations where a genuine situation of mutual dependency exists" [emphasis added]. I am thus satisfied that the judge's finding that family life existed in the circumstances of this particular appeal was one that fell within a spectrum of reasonable conclusions that were open to him on the evidence, and that it was not therefore founded upon an error of law.
7. On the face of the determination, the ECO's second argument might appear to be stronger than the terms in which it is asserted in the grounds of appeal may suggest. Thus, the grounds merely assert that there was "no evidence that [the respondent's father] intended to settle in the UK prior to her turning 18 years of age". At first blush, however, the judge may be thought to have found that her father's desire to settle in the United Kingdom had only arisen after the respondent had turned 18 years of age. Thus, at paragraph 27, the judge said this:

The evidence of sponsor (a man of positive good character) is that he would have applied in 2004 if he could have.

However, it is clear that the sponsor must have been referring to the first occasion upon which it had been theoretically open to him to apply for settlement, following the introduction (in 2004) of a highly restrictive policy (subsequently held to be unlawful) that purported to rectify the historic injustice perpetrated in respect of members of the Brigade of Gurkhas who

had been discharged prior to 1997. The reason that I have reached this conclusion is because, in his witness statement dated the 19<sup>th</sup> May 2014, the sponsor expressly stated that if he had had the opportunity to settle in the UK after his army discharge in 1970, then he and his young family would surely have done so. It was not therefore the case, as the grounds assert, that the Tribunal did not have any evidential basis for the finding that the sponsor's desire to settle in the United Kingdom pre-dated the respondent's age of majority.

8. It would be correct to say that an historic injustice is not necessarily determinative of an appeal that is brought on Article 8 grounds. However, the ECO's grounds are wrong to assert that it was not determinative of on the facts of this particular appeal. Thus, in Ghising and other (Ghurkas/BOCs: historic wrong; weight) [2013] UKUT (IAC) 00567, the Upper Tribunal held that -

... 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 upon by the Secretary of State/ECO consist solely of the public interest in maintaining a firm immigration policy.

I have previously held that, contrary to the arguments advanced by the ECO, the Tribunal was entitled to conclude that the decision to refuse entry clearance interfered with existing family life, and thus engaged the potential operation of Article 8. As I noted in the previous paragraph, there was evidence before the Tribunal that justified its finding that but for the historic wrong, the respondent would have been settled in the UK long ago. The only public policy consideration that the ECO advanced in opposition to the respondent's application was the public interest in maintaining a firm policy of immigration control. These factors therefore justified the Tribunal's decision to determine the Article 8 proportionality assessment in the respondent's favour. Its decision to do so cannot therefore be said to amount to an error of law.

### *Decision*

9. The appeal is dismissed

Anonymity not directed.

Signed

Date

David Kelly

Deputy Judge of the Upper Tribunal