



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

Appeal Number: OA/00099/2014

THE IMMIGRATION ACTS

Heard at Field House

On 18 February 2015

**Decision & Reasons
Promulgated
On 14 April 2015**

Before

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

Between

**MISS GEETA GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellant: Mr G Duncan

For the Respondent: Mr I Jarvis

DECISION AND REASONS

1. The appellant is a citizen of Nepal who was born on 17 May 1991. On 23 September 2013 she applied for entry clearance to the United Kingdom as an adult dependent relative of the widow of a Gurkha, her father, who had formerly served in the Brigade of Gurkhas. He passed away in September 1992 and, according to documentation in the file, he had served in the army for a little short of seven years, from 1963 - 1970.

2. The appellant's application was refused by a decision dated 3 December 2013. The appellant appealed that decision and the appeal was heard by First-tier Tribunal Judge Boyd. In a determination promulgated on 14 October 2014 he dismissed the appeal under the Immigration Rules and under Article 8 ECHR.
3. The appellant sought permission to appeal that decision. Permission was granted as follows:-

“3. I am satisfied 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.”

This is not an approved or helpful 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.

The Grounds of appeal

4. The grounds are to the effect that the judge erred in finding that the relationship between the appellant and her mother (“the sponsor”) did not go beyond the normal emotional ties. Having made that finding the judge failed to properly take into consideration the principles set out in the line of authorities concerning Gurkhas and their families and the approach to be taken with regard to proportionality. Furthermore the judge was wrong to say that as this was an Article 8 case outwith the Rules he had to be satisfied that there are compelling, compassionate or exceptional circumstances such that the decision not to allow the appellant entry clearance would be disproportionate.
5. In addition the grounds submit that the judge failed to consider the historic wrong against the appellant's Gurkha father, there being no reason why the principle should not apply equally to widows of Gurkhas. The sponsor qualified for settlement under the policy and had that been in operation “at the time of her husband's death/service she would have settled (that being her evidence) in the UK long ago and certainly whilst her daughter was a minor.” In that case the appellant would inevitably succeed on proportionality and the real argument is whether family life exists. It is said thereafter that given that the appellant has lived almost continuously with the sponsor since birth, had been visited by the sponsor in 2014, kept in daily contact with the sponsor, and was financially supported by her and

the judge accepted that the appellant and the sponsor had very close ties had the judge given proper consideration he would have come to a different conclusion and found that there was family life.

The IDIs

- 6.** It is not in dispute that the sponsor was granted a settlement visa issued under the Secretary of State's concession afforded to widows of former Gurkhas set out in Immigration Directorate Instructions (IDIs) Chapter 15 Section 2A, Annex B.
- 7.** Annex B makes clear that the discretionary arrangement only applies to widows. The sponsor will have qualified for settlement because she is the widow of a former member of the Brigade of Gurkhas who was discharged before 1 July 1997, having served for at least four years in the Brigade, and who therefore qualified under Annex A of the IDIs. Annex B states further that children or other dependent relatives of former Gurkhas will have to meet the relevant Immigration Rules or other appropriate discretionary criteria.

The Immigration Rules

- 8.** It was accepted before the First-tier tribunal that the appellant could not meet the requirements of the Rules. Appendix FM at Section EC-DR.1.1.(d) sets out that the applicant must meet all of the requirements of "Section E-ECDR: Eligibility for entry clearance as an adult dependent relative".
- 9.** E-ECDR 1.1. in turn requires that an adult dependent relative must meet all the requirements set out in paragraphs E-ECDR. 2.1.to 3.2. In essence this appellant had to show that as a result of age, illness or disability she required long term personal care to perform everyday tasks; was unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where she is living, because it is not available and there is no person in that country who can reasonably provide it; or it is not affordable.
- 10.** In addition there are financial requirements. The appellant had to provide evidence that she could be adequately maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds and in circumstances where the sponsor is settled in the UK. The appellant had to provide also an undertaking signed by the sponsor confirming that the appellant would have no recourse to public funds, and that the sponsor would be responsible for the appellant's maintenance, accommodation and care, for a period of five years from the date the applicant enters the UK if granted indefinite leave to enter. The appellant could not provide such evidence and thus failed under the Immigration Rules.
- 11.** The judge notes elsewhere that the sponsor is not in receipt of a Gurkha widow's pension because her late husband served in the army for less than the required period to be awarded one. She receives pension credit

in the UK, is not working, and is in receipt of housing benefit and other state benefits as her main means of support. She would not be able to fully financially support the appellant. Furthermore the sponsor is residing in rented accommodation with no independent property inspection report to show the size of the accommodation, its occupants, and its suitability. There has been no undertaking given confirming that the appellant will have no recourse to public funds. These factors would be placed in the scales on any Article 8 proportionality assessment.

Article 8 Considerations

- 12.** To succeed the appellant needed to show before the First-tier tribunal that Article 8 was engaged and that there was family life with the sponsor. If such family life existed then the “historic wrong” was a factor to be taken into account in carrying out the proportionality exercise.
- 13.** The judge did not find that there was family life. He did not accept that there are greater than normal ties between the appellant and the sponsor. He found at paragraph 22 that although the appellant claimed that she has been living on her own in Nepal for 23 months the sponsor made it perfectly clear in her oral evidence that the appellant is living with friends who will look after her, if necessary. The judge found for all the reasons given that he could not rely on the GP report as accurately reflecting the appellant’s assertion that she is suffering from fainting attacks and depression.
- 14.** The judge did not dispute that the appellant and the sponsor may have close ties and a very close loving relationship but “no attempt was made at the time the sponsor came to the United Kingdom for the appellant to come with her and the only explanation for her not coming was that she was continuing her studies”. He found that if they are as close as is claimed it would have been expected that either the sponsor would have remained in Nepal until the appellant had completed her studies or the appellant would have attempted to come at the same time as the sponsor: “ ... neither of these applies”.
- 15.** In paragraph 28 the judge further reasoned why Article 8 was not engaged finding that the appellant and sponsor had no real dependency upon each other. He found that they simply missed each other and this did not constitute dependency.
- 16.** Since the appellant could not meet the requirements of the Immigration Rules and the judge found that Article 8 was not engaged, a conclusion that he was entitled to reach for the reasons that he gave, he needed to say little more before dismissing the appeal. Nevertheless, as he expresses in paragraph 29 “had I been carrying out the balancing act under Article 8, I would have reached the same decision that it was not disproportionate”.

17. In the same paragraph the judge states: "I am not satisfied that there are any compelling, compassionate or exceptional circumstances in this case such as to render the decision disproportionate". This may refer to the guidance issued by the respondent to her officials in deciding whether to grant leave to remain outside the Rules, in the exercise of the residual discretion she has to grant such leave. Reference is made in that guidance to "exceptional circumstances". Exceptional appears to mean circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. i.e. where a breach of Article 8 would be involved.
18. The approach of the judge in considering the appellant's circumstances and the consequences for her after finding that the appellant cannot bring herself within the Rules and where Article 8 is not engaged cannot be said in our view to be an incorrect one. The judge has considered everything required of him even if paragraphs 19 and 29 could have been worded more accurately. He seems to have conflated the applicable Rules, policy guidance in relation to Gurkhas, and Article 8 into a simple paragraph but if that is an error it is not a material one because he has considered each issue separately elsewhere in the determination.
19. The judge having found that Article 8 was not engaged nevertheless (at paragraphs 29 and following) considered what the position would be if he had been carrying out a balancing exercise under Article 8. He found that he would have reached the same decision that it was not disproportionate to refuse the appellant entry clearance. In those paragraphs he gave reasons why he came to that conclusion. He made reference to the statutory guidance that is provided by Part 5A of the Nationality, Immigration and Asylum Act 2002 at 117B in the context of Article 8 which sets out the public interest considerations applicable in all cases. He took into account that the appellant had not provided any evidence that she is an English speaker such as would cause her to be less of a burden on taxpayers and better able to integrate into society; neither is the appellant financially independent. It is in the public interest and in particular in the interest of the economic well-being of the United Kingdom that persons who seek to enter or remain here are financially independent.
20. We find that the judge was entitled to conclude that s.117B has a substantial bearing in assessing the public interest in this particular appeal because that section contains statutory guidance.
21. In paragraph 33 the judge referred to assessing Article 8 under the **Razgar [2004] UKHL 27** jurisprudence and the balancing exercise. For reasons given there and earlier in the determination - matters that he was entitled to conclude in the way that he did - he found that he was not satisfied that it had been established on a balance of probabilities that it would be disproportionate to refuse the appeal.
22. The judge grapples with the "historic wrong" point in paragraph 26 of the determination although he does not refer to it in those terms. The

authorities such as **Gurung & Others {2013} EWCA Civ 8** and **Ghising & Others (Gurkhas/BOCs: Historic wrong; weight) [2013] UKUT 00567 (IAC)** and the cases referred to therein found that if an individual came within the protection of Article 8(1) the balance of factors determining proportionality for the purposes of Article 8(2) will be influenced, and perhaps decisively influenced, by the fact (if it is a fact) that, but for the historic wrong the family would or might have settled in the United Kingdom long ago. As per the headnote in **Ghising & Others** at 4:

“... 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.”

- 23.** How does that apply to the current appellant’s situation? At paragraph 26 the judge found that to the best of anyone’s knowledge it would appear that the appellant’s father, having served his time in the army, simply returned home. There was no evidence that he ever applied to reside in the United Kingdom and the sponsor did not do so until it was brought to her attention by someone that she could apply to live here. The sponsor in her written statement set out that she strongly feels that if her husband had been permitted he would have settled in the UK when he left the army as the family would have had a better life here.
- 24.** It seems to us that this falls far short of good evidence being provided that, but for the historic injustice, the sponsor’s husband would have settled in the UK. The sponsor does not suggest that there were conversations about settlement outside Nepal. The way that the judge put it was that there was no evidence that the appellant’s father ever applied to reside in the United Kingdom. That does not provide a reasoned response to the point made about the historic injustice. However, in context it is clear enough that, read with the other points made and set out in paragraph 26, the appellant did not show that she could take the benefit of the historic injustice point when it came to the carrying out of the Article 8 proportionality exercise. The judge was entitled to find that the evidence was simply not present to enable him to do so, and this for the reasons given.

Our Decision

- 25.** It is for these reasons that we do not find that the First-tier Tribunal Judge erred materially in law or that there is any other good reason why this decision should be set aside. Therefore the decision of the First-tier Tribunal Judge stands and that is that the appeal is dismissed under the Immigration Rules and on human rights grounds.

26. No application has been made for an anonymity direction and we cannot see that one is warranted in the circumstances. Therefore we do not make one.

Signed:

Date

Upper Tribunal Judge Pinkerton