



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

Appeal Number: OA/09534/2013

THE IMMIGRATION ACTS

Heard at Field House

On 15 December 2014

**Decision & Reasons
Promulgated
On 5 January 2015**

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Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**MR SANTOSH PUN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr G Duncan, Counsel instructed by N C Brothers & Co Solicitors

For the Respondent: Mr E Tufan, Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal on Article 8 grounds against the refusal of entry clearance for the purposes of settlement as a dependent of a Gurkha veteran. The First-tier Tribunal did not make an anonymity

direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of Nepal, whose date of birth is 24 October 1985. His father, Mr Kesh Bhadur Pun, is a former Gurkha soldier. In 2006 he entered the United Kingdom with his wife, the appellant's mother, as a visitor. He then made an in-country application for leave to remain as a former Gurkha soldier, and his wife joined in the application as his dependant. The application was successful.

The refusal of entry clearance on 24 October 2007

3. Just over a year after he had last seen his parents in Nepal, the appellant's application to join them in the UK was refused on 24 October 2007. The Entry Clearance Officer's reasons were that he was 22 years old and claimed to be studying in full-time education in class 10. He was aware that the average age for students in class 10 was 16 or 17. He had submitted a letter from his school stating he was unable to complete his class 9 examinations in 2004 because of ill health. However, he had also submitted a letter from a doctor dated 27th March 2005 which stated he was suffering from an anxiety disorder and he had been advised to rest for a month. There was no evidence to support what he had been doing since then. As such, he could not be satisfied that his enrolment to class 10 at this time was not simply an attempt by him to make it appear that he was in full-time education and dependent on his sponsor. In any event, he noted he had an older sister age 25 who was living in Nepal. He was not satisfied that the appellant was not leading an independent life and that there were compelling family or other considerations which made his exclusion undesirable, as required by paragraph 276X of the Rules.
4. The appellant's solicitors settled a notice of appeal on the appellant's behalf in November 2007 arguing that the Entry Clearance Officer had failed to apply the discretionary criteria contained in chapter 29 of the Diplomatic Service Procedures. Accordingly the refusal decision was unlawful, and it also was a breach of the appellant's rights under Article 8 of the ECHR.

The decision of Judge Kimnell in July 2010

5. The appeal eventually came before Judge Kimnell sitting at Hatton Cross on 21 July 2010. Both parties were legally represented. The sponsor gave oral evidence. He had arrived in the UK in September 2006. He had previously lived in the United Kingdom in 1979 and 1986 whilst serving in the British Army. His son had recovered by October 2007. From time to time after 2005 his son's health had not been okay. But he was able to work. The appellant had left school and had begun a computer course.
6. In closing submissions on behalf of the Entry Clearance Officer, Ms Ellis submitted that there were no more than normal emotional ties between the appellant and his parents in the UK. Contact could be continued as

before, and the appellant enjoyed the society of his sister who still lived with him. The sponsor had decided to separate himself from his children when he decided to immigrate to the UK.

7. In his subsequent determination, Judge Kinnell directed himself that the relevant date for the determination of the facts was the date of decision, namely 24 October 2007. The judge found that the evidence that the appellant was not leading an independent life in October 2007 was extremely thin, and consisted of assertions from witnesses with virtually no documentary support. However he accepted, by the finest possible margin, that at the date of decision the appellant was not leading an independent life in that he was being supported financially by his father. But the appellant was not living alone. He shared a house with his sister, and there was no reason to suppose they did not enjoy one another's society, and that there was an element of (mutual) emotional support. With regard to the Article 8 claim, he agreed with Ms Ellis's submission there was nothing beyond normal emotional and financial dependency. At the age of 22, which was his age at the date of decision, he really could not see why the appellant was incapable of living independently of his parents. The sponsor himself said that he was fit and able to work. The judge continued:

In fact I do not find proportionality to be an issue since I do not accept that Article 8 is engaged in a case such as this where the appellant is a young man of 22 capable of working and living independently of his parents. Moreover, it has not been shown to be unreasonable for the appellant's parents to continue to reside in Nepal, of which country both are nationals, and the country in which they have an established home, and adult children residing. The parents have made a choice to live in the UK without any guarantee that their adult children can join them. The UK is not obliged to acquiesce to that choice.

8. The judge went on to dismiss the appeal under the Rules and also under Article 8 ECHR. However he allowed the appeal on the limited basis that the decision was not in accordance with the law because the respondent had failed to take into account published policy when deciding the application.

The Decision under the Published Policy

9. On 25 October 2010 the Entry Clearance Manager at the British High Commission in New Delhi gave his reasons for refusing him entry clearance under the discretionary policy outlined in chapter 29.14 of the IDIs. In assessing whether settlement in the UK was appropriate the ECO should consider the following factors:
- one parent or relative of the applicant is present and settled in the UK under the HM Forces Rule; the applicant has previously been granted limited leave as a dependent of a member of HM Forces;

- the applicant has been, and wishes to continue, pursuing a full-time course of studies in the UK;
 - refusal of the application would mean that the applicant would be living alone outside the UK and is financially dependent on the parent or relative present and settled in the UK under the HM Forces Rule;
 - the applicant would find it very difficult to function because of illness or disability without the help and support of their parent or close relative in the UK.
10. If one or more of the factors listed above were present, the ECO might exercise discretion and grant entry clearance for settlement to the UK.
11. The ECM said he had carefully considered the appellant's case against the instructions in chapter 29.14 which he had set out above. He had considered matters afresh in accordance with the spirit of the judge's determination. The criteria were not prescriptive. There was no evidence that the appellant suffered from any illness or disability. The ECM went on to cite various findings made by Judge Kimnell. The ECM concluded that the appellant had not demonstrated that he was living alone outside the UK, or he would find it difficult to function because of illness. He was also not satisfied that he was solely dependent upon his father in the UK other than by choice. The exercise of discretion in his favour was not justified.

The Appeal against the Decision of 25 October 2010

12. The appellant appealed against this decision on 8 April 2013. The explanation for the lateness of the appeal was that the notice of decision had not been received by the appellant until 24 March 2013.
13. It is not clear how this procedural question was resolved. The email traffic disclosed by the appellant's solicitors indicates that the British High Commission in New Delhi maintained the position that the decision letter had been sent to the appellant by registered post on 17 December 2010, and the letter had not been returned as undelivered.
14. Moreover, in an ECM review dated 20 January 2014 the appellant was treated as having made a fresh application under the discretionary policy on 28 May 2013, which had triggered a fresh refusal decision on 14 June 2013, leading to a fresh notice of appeal on 21 November 2013.

The Hearing before, and the Decision of, the First-tier Tribunal

15. The matter came before Judge Britton sitting at Newport in the First-tier Tribunal on 28 March 2014. The case advanced by Mr Howells on behalf of the appellant was that the appellant was appealing on Article 8 grounds only from the decision dated 25 October 2010.
16. In his skeleton argument, Mr Howells said that at the date of the refusal the appellant was a young adult age 25. He had always lived with his

mother until his parents relocated to the UK to settle. During the period apart, the nature of the dependency did not change. The appellant had not founded a family of his own. He remained dependent emotionally, practically and financially. At the time of the decision in October 2010, the appellant was still living with his sister and was not alone. There had been a change of circumstances since then, as his sister was now married and living an independent life of her own. As Tomlinson LJ had made clear in **UG (Nepal) [2012] EWCA Civ 58**, where a decision was remitted for reconsideration under the policy, the ECM must not allow the passage of time to act unfairly against the appellant.

17. In his subsequent determination, Judge Britton quoted extensively from Judge Kinnell's determination, including his finding that the appellant's ties to his parents did not go beyond normal emotional ties, and he was capable of living independently of his parents.
18. In paragraph [26], he rejected Mr Howells' argument that there had been a material change of circumstances since 2010. He found that the appellant still enjoyed a brother and sister relationship, and there would still be emotional support for one another even though the sister was now married. They lived in the same town, and therefore they were not at a great distance from one another. The appellant's sister had never supported the appellant financially.
19. In paragraph [28] the judge held that the psychiatric illness claim had not been pursued by the appellant or the sponsor. In any event, the appellant was fit enough to be able to undertake training to be a chef. He was satisfied that the appellant would not have a problem obtaining employment in Nepal in the catering business.
20. The judge went on to find that the appellant was leading an independent life, and he "would not succeed" under Article 8. He concluded by saying that any interference with the appellant's private and family life was proportionate to the legitimate aims of applying the immigration policy of the United Kingdom.

The Application for Permission to Appeal

21. The appellant applied for permission to appeal, arguing the judge had erred in law by failing to consider the principles set out in **Ghising (Family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC)**.

The Initial Refusal of Permission

22. On 6 August 2014 Judge Chohan refused permission as overall the findings made by the judge were open to the judge on the evidence before him. Adequate reasons had been given. Even if the judge had specifically referred to the case of **Ghising**, there was nothing to suggest that his findings would have been any different. The appellant had not been prejudiced.

The Eventual Grant of Permission

23. On a renewed application for permission to the Upper Tribunal, Upper Tribunal Judge Macleman granted permission on 30 October 2014. While granting permission, he observed that the submissions for the appellant were rather inconsistent about whether the assessment of proportionality should be as at 24 October 2007, or as at 25 October 2010 or based on a subsequent material change of circumstances. On the last point, Judge Britton had made a factual finding against the appellant, and the extract now quoted from **UG [2012] EWCA Civ 58** said that such matters could cut both ways. Although the facts were not at all complicated, this was not an easy case to untangle, with evidence, decisions and submissions going to various points in time. However, he thought there was enough in the grounds to suggest the judge might not have made the basis of decision as clear as it needed to be.

The Hearing in the Upper Tribunal

24. At the hearing before me, Mr Duncan submitted it was not clear whether the judge was referring to the circumstances appertaining in 2007, 2010 or 2013. He had erred in law in not applying **Ghising** to the 2007 set of facts. This was the set of facts most favourable to the appellant, as then he had been physically separated from his parents for one year and one month.
25. In reply, Mr Tufan submitted that the circumstances appertaining in 2010 were the only ones which were relevant. Article 8(1) was not engaged, and this disposed of the Article 8 appeal.

Discussion

26. Between 2010 and the date of the hearing before Judge Britton there were two developments in the law relevant to Gurkha dependants, one of which has a direct bearing on this appeal, and the other of which does not.
27. The development which does not have a direct bearing on this appeal is the finding by the Court of Appeal in **Gurung and Others [2013] EWCA Civ 8** that the weight to be accorded to the historic wrong in Gurkha ex-servicemen cases was not to be regarded as less than that to be accorded for the historic wrong suffered by British overseas citizens. The effect of that, as analysed in **Ghising and Others (Gurkhas/BACs: historic wrong: wage) [2013] UKUT 00567 (IAC)** is set out in headnote [4] of that decision:

Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the appellant would have 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.

28. While this development in the law assists an applicant such as this appellant on the issue of proportionality, it does not make it any easier for someone in his position to establish that Article 8(1) was engaged at the relevant date of decision.
29. On this issue, Mr Howells before the First-tier Tribunal relied on **Ghising (Family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)**, a decision of the Upper Tribunal chaired by Mrs Justice Lang. She considered **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31** and made the following observation at paragraph 56: "We accepted the appellant's submission that the judgments in **Kugathas** have been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts."
30. She went on to give a series of examples where the Court of Appeal and the Strasbourg Court had found, or had upheld a finding, that a young adult who continued to live with his parents enjoyed family life with them for the purposes of Article 8(1).
31. In his skeleton argument for the First-tier Tribunal, Mr Howells submitted that, applying **Ghising**, Article 8(1) was engaged at the relevant date of decision (25 October 2010) as the appellant had not founded a family of his own, and remained dependent emotionally, practically and financially on his parents in the UK.
32. However, Mr Howells muddied the waters by going on to rely on the fact that his sister was now married and living an independent life. This was irrelevant, as the Article 8 claim had to be assessed as at the date of the decision under appeal, and not by reference to the state of affairs at the hearing.
33. I note that in his renewed application for permission to the Upper Tribunal, Mr Howells submits that Judge Britton fell into error because he did not apply **Ghising** to the 2007 set of facts. In my judgment this is an unfair criticism of Judge Britton as Mr Howells' skeleton argument before the First-tier Tribunal plainly directed the judge's attention to the circumstances appertaining in 2010, when the appellant was age 25, and not to the circumstances appertaining in 2007, when the appellant was 22; and when the period of separation from his parents was one year and one month rather than four years, as it was in 2010.
34. But the criticism is academic, as on analysis the appellant was not disadvantaged by Judge Britton's approach. Judge Britton rightly took the findings of fact made by Judge Kimnell as his starting point, in line with **Devaseelan**.
35. As it happens, the findings of fact made by Judge Kimnell were expressly directed to the state of affairs in 2007, not the state of affairs in 2010. So

Judge Britton was focusing on the most favourable set of facts for the appellant, which were those appertaining in 2007.

36. The difficulty for the appellant is that Judge Kinnell had given clear reasons for finding that the appellant did not enjoy family life with his parents for the purposes of Article 8(1) as of October 2007. Moreover, his clear findings of fact had not been challenged by way of appeal.
37. A further difficulty for the appellant's case was that no attempt was made before the First-tier Tribunal to bring forward new evidence which rebutted Judge Kinnell's findings of fact as to the *absence* of family life in 2007. The only new evidence that was brought forward was in respect of developments since 2010 which did not shed any further light on the appellant's circumstances in 2007. Mr Howells simply relied on the proposition that if Judge Kinnell had approached his fact-finding exercise applying the guidance given by Mrs Justice Lang in **Ghising**, he would have, or should have, found that the appellant continued to enjoy family life with his parents in the UK in 2010 (as he had done in 2007).
38. As submitted by Mr Tufan, this line of argument is misconceived. This is apparent from **Gurung [2013] EWCA Civ 8** where, giving the leading judgment of the court, the Master of the Rolls addressed the question of what constitutes family life within the meaning of Article 8(1) from paragraph [44] onwards. At paragraph [45] he said:

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 a particular case. Ms McGahey submits, therefore, that the case law, both domestic and European, can be of only limited assistance. She rightly accepts 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* (my emphasis)
39. He went on to find that the First-tier Tribunal in the appeals of **NL and SL** had not erred in law in rejecting a family life claim because there was no evidence to suggest a bond over and above that usually to be expected from the relationship between adult parents and their children. The sponsor stated that they had regular contact with each other, but there was no real evidence about how the appellants related to their parents or about the effect on them of being separated from their parents and what emotional sustenance that they received from their parents (paragraph 48).
40. There was thus no error of law in Judge Kinnell rejecting the Article 8 claim in 2010 on the grounds that it had not been proved that the appellant had more than normal emotional ties to his parents in the UK in October 2007. It follows there is no error of law in Judge Britton taking this crucial finding of fact as his starting point, and also as in effect his end point. For, as previously discussed, no attempt was made to show by way of new evidence that the ties between the appellant and his parents went

beyond normal emotional ties as of October 2007, or indeed as of October 2010. Merely asserting that the appellant was emotionally dependent on his parents at all material times is not evidence, especially when there is a judicial finding of fact which directly contradicts this assertion.

41. The judge's reasoning on this crucial issue could have been clearer. But it is tolerably clear that, by endorsing the findings of Judge Kinnell, Judge Britton was making a finding that Article 8(1) was not engaged as of 2007 and/or 2010.
42. If I am wrong about that, I find that the lack of reasoning does not translate into a material error of law as no reasonable Tribunal properly directed could have reached any other conclusion (in the light of the unappealed findings of fact made by Judge Kinnell) that Article 8(1) was not engaged as of 2007 and/or 2010.
43. Judge Britton was invited to address an additional and separate question, which was whether the appellant's circumstances had worsened between 2010 and the date of the hearing before him. He was encouraged to do so by the evidence which was led as to the appellant's current circumstances, and also by Mr Howells' reliance on the following passage in the judgment of Tomlinson LJ in **UG (Nepal) and Others [2012] EWCA Civ 58** at 28:

The ECO is entitled to take into account developments subsequent to the date of the initial application, insofar as they amount to a material change of circumstances. In so proceeding the ECO would of course be mindful of the need not to permit a material change of circumstances to lead to unfair treatment of applicant. Changes of circumstance can cut both ways. Serious illness may have intervened which was not present at the time of the application. There would be no unfairness in denying settlement rights in the UK to a once dependent applicant who has subsequently married or formed some liaison with a millionaire overseas.

44. The unfair treatment point might have been relevant if there had been a material change of circumstances between 2007 and 2010. But neither party contended that there had been and, as previously discussed, Judge Kinnell had assessed the Article 8(1) question on the set of facts potentially most favourable to the appellant, namely the facts appertaining in 2007.
45. The enquiry into whether there had been a material change of circumstances since 2010 was irrelevant for three reasons. Firstly, whatever had happened since 2010, this could not change the facts as they stood in 2010, or indeed as they stood in 2007. Secondly, this was not a case where the stance of the respondent was that the appellant had qualified for entry clearance for settlement on Article 8 grounds in 2007 and/or 2010, but no longer qualified because he had established an independent life between 2010 and 2014. Thirdly, it was not contended that the appellant's circumstances had so deteriorated since 2010 that he *now* qualified for leave to enter.

46. However, insofar as it is material, I find that the judge gave adequate reasons for finding that since 2010 there had been no material change for the worse in the appellant's circumstances.

Notice of Decision

47. The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Monson