Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00039/2013

THE IMMIGRATION ACTS

Heard at Newport Crown Court	**Determination Promulgated**
On 5 August 2013	**On 21 August 2013**
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Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE E M DAVIDGE

Between

SUDARSHAN DEWAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Howells, instructed by N C Brothers & Co., Solicitors
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant is a citizen of Nepal who was born on 5 September 1989. The appellant is the son of a Ghurkha veteran. His father came to the UK in 2004 and was granted indefinite leave to remain on 21 March 2005. The appellant came to the UK on 3 August 2006 aged 16. He accompanied his mother and brother. They were granted indefinite leave to remain in order to settle with the appellant's father. In October

2011, the appellant's parents were granted British Citizenship. No application was made on behalf of the appellant, perhaps because on 15 May 2011 he was arrested and charged with a number of offences: attempted kidnapping, putting a person in fear of violence, two counts of having a bladed article in a public place, and criminal damage. On 10 November 2011, the appellant was convicted after a trial at the Oxford Crown Court of these offences. On 2 December 2011, he was sentenced to a four year term of imprisonment for the attempted kidnapping offence and concurrent terms of imprisonment for the other offences of one year, nine months and two months respectively.

2. On 15 December 2011, the appellant was served with notice of his liability to be deported as a "foreign criminal" pursuant to the automatic deportation provisions of the UK Borders Act 2007. Representations were made on the appellant's behalf but on 24 December 2012, the Secretary of State made a decision that s.32(5) of the UK Borders Act 2007 applied and a deportation order was made against the appellant.

3. The appellant appealed to the First-tier Tribunal ("the Tribunal") against the Secretary of State's decision taken on 24 December 2012. The appellant relied upon Art 8 of the ECHR. The Tribunal (Judge Y J Jones and Mrs R M Bray JP) dismissed the appellant's appeal. The Tribunal concluded that the appellant had not established that he had "family life" with his parents in the UK and his recent relationship with his girlfriend had ended. However, the Tribunal accepted that the appellant had "private life" in the UK and that that would be interfered with if he were deported to Nepal. However, the Tribunal found that the appellant's deportation would be proportionate.

4. On 27 March 2013, the First-tier Tribunal (Judge J M Holmes) granted the appellant permission to appeal to the Upper Tribunal. Thus, the appeal came before us.

The Appellant's Grounds

5. Mr Howells, who represented the appellant, relied upon the grounds of appeal and submitted to us that the Tribunal had erred in law in reaching its decision in three respects.

6. First, he submitted that the Tribunal erred in law in allowing the respondent to rely upon a NOMS1 report which was only provided to the appellant's representatives on the morning of the hearing. Mr Howells submitted that either that report should not have been admitted in evidence as it had been served outwith the standard directions and there was no "good reasons" to admit it under rule 51(5) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230) or, if it were to be admitted in evidence, the Tribunal erred in refusing the appellant's application for an adjournment in order to permit the appellant's representatives to obtain the OASyS Report upon which the NOMS1 report claimed to be based. Mr Howells submitted that the appellant had been prejudiced because he did not accept what was said in the NOMS1 report that he had threatened that he would commit suicide to the prison governor. Mr Howells submitted that the refusal of an adjournment was procedurally unfair to the appellant.

7. Secondly, Mr Howells submitted that the Tribunal had erred in its assessment of the risk that the appellant would reoffend. It had failed to take into account his previous good character, namely that he had no previous convictions. Further, the Tribunal had placed too much weight upon the consequences if the appellant reoffended, rather than the low risk that he posed of reoffending at all.

8. Thirdly, Mr Howells submitted that the Tribunal had misdirected itself on the relevance of the "historic injustice" that had resulted from the UK government's policy towards Ghurkha veterans and their families. In this appeal, Mr Howells submitted that the "historic injustice" affected the appellant in that, had it not occurred, his family could have come to the UK and obtained indefinite leave to remain earlier. His parents could then have become British citizens earlier and the appellant himself would have been eligible to be registered as a British citizen prior to his offending which would have prevented the Secretary of State from deporting him.

9. Mr Howells submitted that the Tribunal expressly referred to a statement in the Upper Tribunal's decision in Ghising (Family life – adult – Ghurkha policy) Nepal [2012] UKUT 00160 (IAC) at [93] that the "historic wrong" perpetrated against Ghurkhas carried "substantially less weight" than that perpetrated upon BOCs which had been overruled by the Court of Appeal in Gurung and Others v SSHD [2013] EWCA Civ 8.

Discussion

1. The Adjournment Issue

10. The hearing before the First-tier Tribunal took place on 27 February 2013. The hearing had originally been listed for 6 February 2013 but was adjourned the previous day and relisted for 27 February 2013. The directions for that earlier hearing stated that "no later than five days before the date of the Full Hearing" both the appellant and respondent should send to the Tribunal and the other party "a bundle of **all** documents to be relied upon at the hearing". At the hearing on 27 February 2013, the Presenting Officer provided to the Tribunal and the appellant for the first time a NOMS1 report on the appellant. That report is undated but it is stated that the report was required by 4 February 2013. In that report it is stated at section 2c that:

> "Particular concerns re:
>
> * suicide risk – emotional abuse – threats made to prison governor – futility regarding his life".

At sections 3c and 6b the report states, inter alia, that a source of information was an OASyS Report completed on 24 January 2013.

11. Before the Tribunal, Mr Howells sought an adjournment as he was instructed that the appellant did not accept that he had threatened to commit suicide to the governor and no OASyS Report had been compiled. Mr Howells requested an adjournment in order that the OASyS Report could be obtained and the appellant be given an opportunity to respond to both reports. In the alternative, Mr Howells submitted to the Tribunal that on the basis of rule 51(4) of the First-Tier Tribunal's Procedure Rules, that if the hearing was not to be adjourned then the NOMS1 report should not be admitted.

12. At para 21 of its determination, the Tribunal refused the appellant's application for an adjournment in the following terms:

> "21. We refused the adjournment because it was clear from the NOMS 1 report that an OASyS assessment had been completed on 24th January 2013. The appellant would have been given a copy of that report and the NOMS 1 report states that one of the sources of information was the current OASyS completed by Julian Harvey on 24th January 2013. The appellant can speak English and should have brought this matter to the attention of his instructing solicitors. The appellant's solicitors had been instructed for 'some time' and we see from the file that the First-tier Tribunal was sending correspondence to his solicitors from 11th January 2013 so it is likely that they had been instructed by the appellant before that date. It was clear that they had at least 6 weeks to gather evidence on behalf of the appellant. We refused the adjournment on the basis that the OASyS Report had been available since 24th January and that the appellant's instructing solicitors had had sufficient time to prepare their case."

13. There is no doubt that the respondent had failed to comply with the directions of the Tribunal as to the filing and serving of the NOMS1 report if it was to be relied on. Rule 51(4) of the First-tier Tribunal Procedure Rules states as follows:

> "Where the Tribunal is given directions setting time limits for the filing and serving of written evidence, it must not consider any written evidence which is not filed or served in accordance with those directions unless satisfied that there are good reasons to do so."

14. Consequently, the Tribunal could only consider (the rule states "must not consider") the NOMS1 report if it was satisfied that there was "good reasons to do so". We have no doubt that in a deportation case documents such as NOMS1 reports and others such as OASyS Reports dealing with issues of risk and rehabilitation of an offender are important and significant documents for the Tribunal in considering the legality of an individual deportation. In order to carry out its fact-finding function, we consider that in the usual course of events there would be "good reasons" to admit such documents even though the direction had not been complied with even to the extent of the document only being provided by the respondent on the day of the hearing. That, however, must be subject to the requirements of fairness.

15. Here, the appellant contested what was said in the NOMS1 report. He did not accept that he had threatened to commit suicide whilst in prison. He was not aware, those were Mr Howells' instructions at the Tribunal hearing, that an OASyS Report had been completed. Yet, the NOMS1 document stated that it was based, inter alia, upon an OASyS Report that had been completed on 24 January 2013.

16. Mr Hibbs submitted that the appellant had not been prejudiced by the refusal of the adjournment. Subsequent to that hearing, the respondent provided the appellant (and both parties provided us) with the OASyS Report which had, indeed, been completed on 24 January 2013. Mr Hibbs submitted that the appellant's legal representatives who were instructed in January 2013 could have obtained the OASyS document for themselves. He relied upon the OASyS Report because it did not contain any reference to the appellant threatening suicide to the governor. Consequently, he submitted that it could not have affected the Tribunal's finding in that regard. Mr Hibbs also submitted that the panel had not accepted that the appellant had threatened suicide to the governor in any event.

17. As we have indicated, we were shown the OASyS Report and we considered it *de bene esse*. It is not clear to us that it can be relied upon to show the absence of any prejudice to the appellant. Even if it could, in our judgment the refusal of the adjournment together with the admission in evidence of the NOMS1 report did create prejudice to the appellant.

18. Whilst the appellant could (and indeed did) give evidence that he had not threatened to kill himself to the governor, he was not aware that this was an issue until the date of the hearing. On its face, the NOMS1 report appears to base the "fact" that the appellant threatened to commit suicide to the governor upon other documents reviewed by the writer of the NOMS1 report. Although Mr Howells, before the Tribunal, believed the source was the OASyS Report, we now, of course, know that it was not. But, the NOMS1 report also notes that the writer used as a source of management the "case management system" which he reviewed on 7 February 2013 (see section 6b of the NOMS1 report). Even if that was not the basis of Mr Howells' submission before the Tribunal, it would have become clear to those representing the appellant when they saw the OASyS Report that the source (if any) of the "fact" of the threat of suicide was a different document which they needed access to in order to deal with the allegation. We, of course, do not know what, if anything, the "case management system" would disclose in relation to this matter. We are, in fact, in precisely the same state of ignorance as was the Tribunal at the hearing.

19. The Tribunal, having heard the appellant's evidence, rejected it and made finding in para 46(iii) that the appellant "has made threats to the prison governor regarding the futility of his life". That language mirrors the wording of the NOMS1 report. Then, at para 52 in assessing the risk, if any, of the appellant reoffending states: "We find that <u>all</u> his threats of suicide were to gain sympathy". (Our emphasis).

20. It seems to us, therefore, that the Tribunal made an adverse finding of fact concerning the appellant threatening suicide without the appellant having access to the documents which, on the basis of the NOMS1 report, it could be reasonably concluded were the source of this information. As we have said, we do not know what, if anything, those further documents would disclose. But, in our judgment, the appellant was entitled as a matter of fairness to see those documents in order to deal with the allegation that was being made against him.

21. We do not accept Mr Hibbs' submission that the appellant's representatives could and should have obtained the OASyS Report in advance of the Tribunal's hearing. Before the Tribunal, the Presenting Officer submitted that the Home Office no longer received OASyS Reports and that the appellant could obtain a copy for himself. We were not provided with any further information concerning access to OASyS Reports. What is clear, however, is that the Secretary of State can obtain OASyS Reports. That happened in this appeal prior to the Upper Tribunal hearing. We were told that the Secretary of State sent to the appellant's representatives on 1 August 2013 a copy of the OASyS Report.

22. We do not know, because of the lack of information before us, whether the appellant's representatives could obtain such a report for themselves. We will assume for the purposes of this appeal that they could. Here, however, until the NOMS1 report was given to the appellant's representative on the morning of the Tribunal hearing, the appellant's representatives were unaware of the specific importance (as it was thought then) of the OASyS Report and the information contained within it. There is a dispute as to whether the appellant (and his representatives) knew that an OASyS Report had been produced. Before the Tribunal, it was Mr Howells' instructions that no report had been compiled. Mr Hibbs submitted that the appellant was aware that report had been prepared as he had completed a self-assessment form. Even accepting that, the appellant would not necessarily know that a report had actually been produced and, as we have already said, the importance of the OASyS Report only surfaced on the morning of the hearing because of the contents of the NOMS1 report.

23. It might be thought that the appellant's threatened suicide was a side issue in the case. However, the Tribunal clearly thought it relevant to its assessment of the issue of proportionality. It seems to us that the Tribunal may well have taken into account the "fact" of the appellant's continuing manipulative behaviour in threatening suicide as part of its assessment of the future risk, if any, that the appellant presented to the public or to known individuals.

24. By way of a footnote we would add that we do not accept Mr Howells' submission that the NOMS1 report was, somehow, not to be admitted in evidence simply because it did not reflect progress that the appellant claimed to have made on courses in prison. Those were matters which the appellant could deal with by way of evidence, as indeed he did, of courses completed and any other supporting evidence of his behaviour in prison. In fact, at the time of the hearing he had not completed the Healthy Relationships course. It would then have been a matter of submission by the appellant as to the weight that was to be placed upon the NOMS1 report given that it had not taken into account any evidence of those matters which was accepted by the Tribunal at the hearing.

25. That said, however, for the reasons we have given, in our judgment the refusal of an adjournment in order to allow the appellant to obtain the documents upon which the NOMS1 report was based was procedurally unfair and the First-tier Tribunal's decision cannot stand for that reason alone.

2. Assessment of Risk of Reoffending

26. We do not consider that there is any merit in Mr Howells' submission on this ground taken in isolation. At para 52 of its determination, the Tribunal said this:

> "Although this appellant has been assessed as being of low risk of reoffending it is of note that if he does reoffend there is a high risk to a known adult and a medium risk of serious harm to children and the public."

27. At para 53 the Tribunal continued:

> "At the time of his trial he did not accept that he had done anything wrong and we find that if he does reoffend there are potential serious consequences and high risk to the public."

28. The Tribunal then continued at para 53:

> "We also take into account that the violence predictor is medium and the SARA, the spousal assessment risk is high."

29. Whilst the Tribunal did not expressly refer to the fact that prior to the attempted kidnapping and attack upon his girlfriend the appellant had no previous offences, we have no doubt that that they were well aware of what Mr Howells referred to as the appellant's "previous good character". The risk assessment in the NOMS1 report was, of course, itself based upon the appellant's offending and his circumstances including that these were his first offences. Whilst it was for the Tribunal to assess the appellant's risk, if any, of reoffending, it had to do so in the light of the evidence contained in the NOMS1 report and the other relevant material before it, including the pre-sentence report.

30. We see nothing in the Tribunal assessment of the appellant's risk of reoffending as being inconsistent with what is set out in section 3a of the NOMS1 report. The OGRS or "Offender Group Reconviction Scale" predicts that the risk of the appellant being reconvicted of any recordable offence within two years of sentence as being "low". It is specifically stated that the OGRS: "uses an offender's past and current history of standard list offences only". The General Reoffending Predictor (OGP) and the OASyS Violence Predictor (OVP) provide scores for the likelihood of, respectively, general reoffending and violent reoffending over one and two years after release on licence as being "low" and "medium". The Spousal Assault Risk Assessment is put at "high". We do not consider that the Tribunal's failure to expressly refer to the appellant's previous lack of conviction as, in any way, demonstrating that its assessment of the risk of the appellant reoffending was flawed.

31. Likewise, we do not accept Mr Howells' submission that the Tribunal attached too much weight to the consequences if the appellant offended and did not attach "any or any adequate" weight to the low level risk of reoffending. As we have said, the risk of the appellant reoffending was for two measures "low" but in relation to violence was at "medium". In our judgment, the Tribunal properly took into account both the risk, if any, of the appellant reoffending and the consequences to others if he

did in fact reoffend. The weight to be given to those factors was a matter for the Tribunal to assess in the light of all the evidence. There is no basis upon which it can be said that the weight attached respectively to the risk of reoffending and, if it occurred, its consequences, was perverse. For these reasons, we reject Mr Howells' submission on this issue.

3. Historic Injustice

32. Mr Hibbs did not seek to defend the Tribunal's citation of the UT's decision in Ghising at para 47 of its determination. As we understood Mr Hibbs, he accepted that the statement made by the Upper Tribunal that the "historic wrong" in relation to Ghurkhas carried "substantially less weight" in the Art 8 assessment of proportionality than the historic wrong perpetrated against BOCs had been disapproved by the Court of Appeal in Gurung and Others. We agree, it is clear from the judgment of Lord Dyson MR at [42] disapproved the UT's approach stating that:

> "It also follows that we do not agree with the UT that the weight to be given is generally 'substantially less' in the Ghurkha cases."

33. Instead, Mr Hibbs submitted that the Tribunal's error was not material as the appellant's criminality "trumped" any historic wrong. Mr Howells submitted that the Court of Appeal had indicated that the "historic injustice" gave rise to a "strong claim" under Art 8. Although, Mr Howells accepted that the Court of Appeal had recognised that "adverse information of a serious nature" was relevant in determining what weight to be attached to the "historic injustice". He submitted that just as "long residence" could outweigh the legitimate aim of the prevention of disorder or crime, so could the "historic injustice" outweigh that same legitimate aim. For the former proposition he referred us to the Court of Appeal's decision in Rocky Gurung [2012] EWCA Civ 62 at [19(iv)].

34. We are in no doubt that the Tribunal misdirected itself in para 47 of its determination citing a passage in the Tribunal's determination in Ghising which was expressly disapproved by the Court of Appeal in Gurung and Others at [42]. Dealing with the "historic injustice" issue, the Tribunal in this appeal stated as follows at para 51:

> "51. Furthermore, the appellant would have been entitled to enter the UK but for historical injustice as a dependent child a little earlier. It is acknowledged by the respondent that it is in the public interest to remedy an historic injustice in the UK government's previous treatment of Gurkha veterans. However the respondent has distinguished between Gurkha veterans, their wives and minor children on the one hand who will generally be given leave to remain. Adult children on the other will only be given leave to remain in exceptional circumstances. Given that the Gurkhas are Nepali nationals this is not inherently unfair or in breach of human rights. This appellant was able to enter the UK as a minor and has been given indefinite leave at the appropriate time. Since the respondent has provided a scheme to remedy the historic injustice in appropriate cases there is a strong public interest in ensuring that the entry of Gurkha veterans and their families is decided fairly and consistently in accordance with the scheme."

35. In our judgment, this paragraph fails to grapple with the implication of the so-called "historic injustice" argument as relevant to this appeal. Mr Howells' argument is that, but for the historic injustice, this family would have settled in the UK earlier and both the appellant's parents and therefore the appellant lost the opportunity to obtain British citizenship at an earlier date such that the appellant would not have been "liable to deportation" as a British Citizen when he committed the offences which underlie the current deportation decision.

36. It is not clear to us how, if at all, the Tribunal took this "historic injustice" into account. There is no doubt that it was relevant in assessing the proportionality of the appellant's deportation. Certainly, in a case not concerned with deportation, Lord Dyson MR in Gurung stated (at [41]):

> "That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Ghurkha who is settled in the UK has such a strong claim to have his Article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in the maintaining of a firm immigration policy."

37. This appeal, of course, is not concerned with the "countervailing public interest in the maintaining of firm immigration policy". We are concerned, instead, with the countervailing public interest in the prevention of disorder or crime. It is well-recognised in the case law that that legitimate aim may have greater potency than where the only public interest engaged is that of maintaining effective immigration control (see, for example, JO (Uganda) v SSHD [2010] EWCA Civ 10 and AM v SSHD [2012] EWCA Civ 1634). Even giving due weight to that public interest, we do not accept that necessarily in this appeal it must outweigh the "historic injustice" relied upon by the appellant and other factors relied upon by the appellant under Art 8. We cannot say that, despite the Tribunal's misdirection, the outcome of its assessment of proportionality would inevitably be adverse to this appellant. It will be for the First-tier Tribunal on remittal of this appeal to take into account the "historic injustice" factor, in the light of the Court of Appeal's decision in Gurung and Others, bearing in mind the recognition in the case law of the greater weight to be attached to the legitimate aim of the prevention of disorder or crime under Art 8.2.

Decision and Disposal

38. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of an error of law. We set aside its decision.

39. In the light of our finding that the First-tier Tribunal's decision not to adjourn the appeal involved a procedural irregularity, applying para 7.2(a) of the Senior President's Practice Statements, it is appropriate to remit this appeal to the First-tier Tribunal for a fresh hearing. Both Mr Hibbs and Mr Howells invited us to remit the appeal in these circumstances.

40. We remit the appeal to the First-tier Tribunal for a *de novo* rehearing (not before either Judge Y J Jones or Mrs R M Bray JP).

41. The appeal should be listed for a case management hearing as soon as practical in order to deal with, inter alia, any directions that should be made concerning disclosure of documents.

Signed

A Grubb
Judge of the Upper Tribunal