Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00921/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 May 2014	**On 17th June 2014**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

MR SANJOG KUMAR RAI

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr P Nathan instructed by Howe & Co
For the Respondent: Mr T Melvin, Senior Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. In my decision dated 2 April 2014 I set aside the determination of the First-tier Tribunal dismissing the appeal against the Entry Clearance Officer's decision dated 5 December 2012 to refuse the appellant entry clearance to settle in the United Kingdom with his father as follows:

1. "The appellant is a national of Nepal where he was born on 12 December 1988. He appeals with permission the decision of First-tier Tribunal Judge Mozolowski who had dismissed his appeal on Article 8 grounds (the only grounds relied on) against the decision of the Entry Clearance Officer dated 5 December 2012 refusing his application to settle in the United Kingdom as the adult dependent relative of his parents who now live here.

2. The judge found that the family life between the appellant and his parents was not family life protected by Article 8 of the Human Rights Convention. She nevertheless considered the issue of proportionality on a hypothetical basis but did not consider in the circumstances that the "historic injustice" done to Gurkhas was sufficient to counteract the public interest argument in respect of "the maintenance of fair but firm immigration control".

3. The grounds of challenge which led to the grant of permission asserted that the judge had erred in its approach to the Article 8 considerations. Taking account of the appellant's dependency it is argued the judge had erred in her approach to the consideration of "historic injustice" when assessing proportionality. Permission to amend the grounds of appeal at the hearing was granted in the face of no opposition from Mr Saunders. That amendment was in terms that the judge had failed to consider as a starting point that protected family rights had been held to exist by the First-tier Tribunal's consideration of the appellant's appeal in its determination dated 4 October 2010. Reliance is placed on the Tribunal decision in *Devaseelan* [2002] UKIAT 00702; [2003] Imm AR 1. It was further argued that the appellant continued to be financially dependent upon his sponsor in the United Kingdom.

4. Mr Saunders acknowledged that the judge may have been in error in not following the approach set out in *Devaseelan* but he did not accept that the error was material having regard to the time that has passed since the earlier decision. After hearing argument on this aspect, I gave my decision that the judge had erred in her approach in not taking the finding of family life by Judge Adio as her starting point. As a consequence the evidence would need to be heard again in order to distil what was before Judge Adio and what had occurred since in the two years between the Tribunal's earlier decision and the decision under appeal dated December 2012.

5. Mr Saunders accepted with reference to the decision in *Ghising and Others* (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) that the Secretary of State relied only upon the public interest as justification for interference with any family life that is established. He was correct to do so as there is no indication otherwise in the reasons given by the Entry Clearance Officer for refusing the application. It follows therefore that in the event that the appellant is able to establish that his family life remains as previously found, there is a real possibility that the appellant could succeed particularly in the light of the observation in *Ghising* at [60]:

> "But, if the respondent is only relying upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the appellant's favour".

6. For these reasons I am satisfied that the determination of the First-tier Tribunal Judge requires to be set aside and remade. That remaking will be in the Upper Tribunal on 22 April next when it is envisaged four witnesses will give evidence on the appellant's behalf.

7. Directions were given at the hearing that the appellant's representative is to file a detailed skeleton argument which should detail the evidence that was before First-tier Tribunal Judge Adio, the factual matters he took into account in coming to his conclusion that family life existed and finally, any change in the appellant's circumstances since that decision."

REMAKING THE DECISION- THE EVIDENCE

2. At the resumed hearing of the appeal on 22 April, the appellant's uncle, Badri Rai gave evidence. The hearing was then adjourned as there was no interpreter. At the resumed hearing on 19 May the appellant's father Madan Bahadur Rai and his sister Laxmi Rai gave evidence through interpreters. I reserved my determination after hearing oral submissions supplementing the helpful skeleton arguments which had been provided by both representatives.

3. The paperwork before me comprises:

   (a) the respondent's bundle which includes a copy of the application, the record of a telephone interview of the appellant and documents that he relied on in support of his application dated 8 August 2012;

   (b) a bundle of documents provided by the appellant's representatives including statements of the above witnesses and their identity documents, a statement by Basanta Rai, the appellant's second cousin who was not called and a statement by Laxmi Rai's husband, Dilip Subba who was present at the hearing but for whom Mr Melvin had no cross-examination. In addition that bundle comprises documents relating to the appellant's father's circumstances but also paperwork regarding his schooling and remittances;

   (c) a statement by Laxmi Rai provided separately.

4. In the course of cross-examination of Laxmi Rai, Mr Melvin produced a copy of her entry clearance application. Mr Nathan objected to this on the basis that Mr Melvin had the opportunity of producing this document at the outset of the hearing and it was not possible for him to take instructions from the witness in the middle of her cross-examination. Mr Melvin explained that during the lunch adjournment (after my completion of the morning list) he had looked at the application on the file. It had been clear to him from the start that evidence in relation to the dates relied on by the appellant (as to his circumstances in Nepal) was scant.

5. I refused the late production of this document reminding the parties that the issue in the case had all along been whether family life existed at the date of decision. Mr Melvin had indicated that he had concerns from the outset about the evidence in relation to the dates and therefore must have been conscious that there might come a

point when he would wish to rely on the unread document. He had not given a satisfactory explanation why he had not shown that document to Mr Nathan at the outset of the hearing. I did not consider therefore it was in the interests of justice for leave to be granted for its late production in the face of understandable opposition from Mr Nathan.

6. Mr Melvin thereafter continued his cross-examination of Laxmi Rai. The only further issue outstanding related to evidence regarding the dates on which the appellant's mother had come to the United Kingdom after she was granted entry clearance to settle here on 20 August 2009. I gave a direction in the course of the hearing that it was for the appellant to produce evidence by means of a faxed copy of Tika Rai's passport. I reminded the parties of this direction after the hearing; a copy has now been provided.

7. It was necessary to remind Mr Melvin in the course of the hearing of the limit on the issues I was required to determine with specific reference to [4] and [5] of my error of law decision. In essence Mr Melvin contended that recent case law with reference to the new Rules meant that Judge Adio's determination could not be relied on as showing that family life existed between the appellant and his sponsor as at 5 December 2012. I reminded him that much of the recent case law related to justification of interference where there is protected family life as opposed to whether that family life has been established. I reminded him that it had been conceded by Mr Saunders at the error of law hearing that the Secretary of State relied only upon the public interest as justification for interference. Helpfully Mr Melvin refocused his questions.

8. At the hearing of the appeal by the appellant and his sister on 27th September 2010 Judge Adio heard evidence from their father who was cross-examined by a Presenting Officer. The judge found as a fact that the two children were attending educational institutions in Nepal and that their father was responsible for their education, clothing and food. There was no contrary evidence to show that the children were working and he accepted that the appellants' finances were being met by their father. The judge went on to conclude at [11] of his determination "bearing in mind there is financial dependency in this case I find that there is more than emotional ties in the present case. I therefore find that there is family life between the appellants and the sponsor in the UK".

9. According to his statement, Badri Rai is currently a lance corporal serving in HM Forces. He is the appellant's maternal uncle. He refers to the appellant's family as close knit. He also states that the appellant relies wholly on his parents for financial support, accommodation and all expenses and that it is his parents' duty in Gurkha culture to support a dependant child until he is independent.

10. In examination-in-chief he confirmed that he had last seen his sister, the appellant's mother between October and November 2013. Prior to that she had come to the UK in 2012 between October and November and that she had returned at the "back end of December 2012". Prior to that she had been here for about two and a half months in

September 2010. Apart from those trips she has been back in Nepal with the appellant.

11. Under cross-examination Mr Rai explained that he had last seen the appellant in 2012 when he had gone to Nepal. He knew the appellant had completed intermediate level in his studies between 2010 and 2011 and that at present he was studying a BA in humanities. That had started between 2011 and 2012, the appellant having had to wait some time for results. When pressed by Mr Melvin Mr Rai explained that he did not know the exact dates as to commencement of the courses. He knew that since 2009 the appellant had been studying some "computer stuffs" and that he had also stated to Mr Rai that he had started an American board course. He knew the name of the last college the appellant had studied at as Namuna in Kathmandu. He confirmed also that the appellant used to live in a hostel at some time when it was put to him that the appellant had been a boarder at that school. He knew nothing about the appellant working between the courses he had undertaken and his BA studies. He had not attended the hearing of the appeal in 2010 due to work commitments. The appellant had never lived away from home between 2010 and 2012 to his knowledge. He did not know anything of the appellant's recreational interests. During that period they had spoken on some six to ten occasions via email, yahoo, facebook and social networking.

12. There was no re-examination. In my question for clarification Mr Rai explained that he had last had contact with the appellant some three weeks previously via facebook.

13. Madan Rai, the appellant's father refers to his marriage in 1966 and the dates of his two children, Laxmi having been born 3 October 1986. He refers to her marriage on 10 July 2013 and her application for entry clearance as his spouse (which has since been granted). His daughter had decided to withdraw her appeal as a result of her marriage and he refers to his son once again being left behind in Nepal. He refers to two visits which he had made back to that country to see the children in 2011 and 2013 on each occasion staying for approximately three weeks. The latter to attend his daughter's wedding and to be with his wife and son. It is not reasonably practical because of work leave and travel costs for him to visit Nepal often. There is a greater need for the money earned to pay for their accommodation, food, tuition and living costs. The appellant's lack of immigration status is a big problem for them and continues to cause them all serious upset.

14. Specifically in respect of the appellant, he refers to him being very much part of the family unit and he relies wholly on him and his wife for financial support, accommodation, tuition and all other expenses throughout his life which Mr Rai was happy to continue to provide if he is granted entry. He refers to his army pension being paid into a joint account with his wife in Nepal from which his wife has been able to withdraw funds in order to support their son. They have also sent money transfers of approximately £500 every two months to assist their children and he produces evidence of this with HSBC bank statements, P60s and Standard Chartered bank account statements as well as money transfers. He refers to the adequacy of accommodation available for his son in the United Kingdom and the tenancy

agreement provided in support. He too refers to a duty in Gurkha culture to support his dependant son until such time as he is independent.

15. In examination-in-chief Mr Rai explained how the family had lived in rented accommodation in Kathmandu until 1994/95 when they bought a small house which was sold in 2008. Thereafter they moved into rented accommodation. He confirmed the dates his brother-in-law had given as to his wife's visits to the United Kingdom but with more precision. Apart from those visits she had been living in Kathmandu with the appellant.

16. Under cross-examination after pursuing questions which required me to remind him of the scope of the appeal, Mr Melvin sought to establish Mr Rai's knowledge of his son's studies and education in Nepal since 2010. From March that year he had studied on an open school board of India. When it was put to him that the course had began in November 2012 he thought on reflection that it had started in 2011 and the results had come out in October 2013. He confirmed the name of the school (Himalayan White House Open School). Our questions then turned to Mr Rai's knowledge of other courses that the appellant had pursued. In the course of his answers Mr Rai referred to a four month course on computers between 2009 and 2010. He referred also to language and graphic design courses. He maintained that his son had started studying at the open school in 2011. He did not accept that his son had only attended education to enhance the chance of his application succeeding and further confirmed that his son had not worked between March 2009 and December 2012. He had made no applications for work during that period.

17. As to his own circumstances Mr Rai explained that on discharge from the army in 1993 he had worked in Hong Kong, Afghanistan and Iraq. In the letter he had been a security guard between 2007 and 2009 during which time he had returned to the family in Nepal on his month's leave each year. His wife looked after his son although he said that he had no medical or psychological difficulties. When asked about the nature of the emotional dependence by the appellant, Mr Rai referred to the need to look after him and to meet all the expenses because both his wife and son were in Nepal. It was not just about the expenses being paid but the emotional element. Mr Rai referred to telephone conversation each day.

18. Laxmi Rai explains in her statement while she had got the opportunity to study in Japan in 2011 and that her mother had returned to Nepal to join her brother. She had returned to Nepal from Japan on completion of her studies and she refers also to the joint application which she had then made with the appellant. Whilst in Japan her accommodation had been paid for by her father as was the case in respect of the accommodation which the appellant lived in Nepal. She describes herself and her brother being completely dependent on their father financially, practically and emotionally. They had no other income. Her father had wanted them to make sure they had a good education and that they further their studies. She and her brother had not been leading independent lives. It had been quite difficult for her brother to function without his parents or any other family members in Nepal.

19. Under cross-examination Mr Melvin questioned the witness about the identity of the university she had been studying at in Nepal and the chronology of those studies. She explained that she had been in Japan until 2013. It was at that point that Mr Melvin sought to introduce the entry clearance application which I refused for the reasons given above.

20. In his continuing cross-examination Mr Melvin established that for the period of time in 2010 that the appellant's mother was in the United Kingdom there was another relative in Nepal but he had moved to the United States. It appears that she was referring to an earlier occasion when that relative had moved and that she had been living with her brother during the months of 2010. During this period she confirmed the appellant had been emotionally dependent upon him. He had shared his personal thoughts with her and he used to talk about what was happening at the college. There was no re-examination.

DISCUSSION

21. In the course of his oral submissions Mr Melvin contended that I had not received in the evidence a real picture of the changes between 2010 and 2012. The appellant at the date of decision was nearly 24 and there was no evidence of closeness beyond normal emotional ties. At best it was purely one of financial responsibility. I invited Mr Melvin to address me on the fact of the appellant's mother continuing to live with him in Nepal. He considered the evidence on this scant noting that her statement did not refer to any emotional ties. He acknowledged the difficulties the Secretary of State would be in if I found that Article 8 was engaged.

22. In his oral submissions Mr Nathan referred to the evidence I heard from the appellant's brother-in-law and his father are that the appellant had always lived with his mother and he referred me to the interview with the Entry Clearance Officer in respect of this. He argued that there would be no material in change in circumstances between the ages of 21 when protected family life had been found and the appellant being about to turn 24 in December 2012. He distinguished in *L* and *Ifzal* by the fact of the appellant's mother continuing to live with him in Nepal. He otherwise relied on his skeleton argument and in particular the references in *Ghising and Others*.

23. In addition to the oral testimony, I have had regard to the statements by the appellant's mother and the appellant himself as well as the other evidential documentation relied on including the record of interview. The Court of Appeal in *Gurung & Others R (on the application of) v SSHD* [2013] EWCA Civ 8 asked the question "what constitutes family life within the meaning of Article 8(1)". At [44] the Master of the Rolls expressed these views:

> "*In several of the appeals the Tribunal found that the applicant did not enjoy family life within the meaning of Article 8(1). Save in the case of the appeals of NL and SL, we do not propose to examine the facts of any of the cases set out before us. Instead we propose simply to say something about what is the correct approach.*

> *45. 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 the particular case. Ms McGahey submits, therefore, that the case law, both domestic and European, can be of 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.*
>
> *46. We think that the cases are of some assistance to decision makers and Tribunals who have to decide these issues. Paragraphs 50 to 62 of the determination of UT in Ghising contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at paragraph 62 that 'the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive'. The correctness of the UT's review has not been doubted before us. We endorse this. We doubt whether any useful purpose is served by further general elaboration."*

Mr Nathan's skeleton sets out that review in Ghising [2012] and refers to the Tribunal's conclusion at [68]

> "*We have found that the appellant depends upon his parents for financial, practical and emotional support and guidance. They depend upon him as their only child still living at home. Mr L. Ghising's evidence was that it is the custom among Nepalese people for the younger son to remain living with his parents, even after marriage, to care for them when they become elderly. This evidence was no challenged by the respondent*."

He argues that the appellant and his family have applied the same custom and offers an explanation for the appellant's mother living separately from her husband as a discharge of that duty no doubt in anticipation of the son in due course observing his own duties to them.

24. Mr Melvin points out the two and half years that had passed since Judge Adio had found family life and that he had done so based solely on financial dependency. It was unclear how much time the appellant's mother had spent in Nepal since 2010 but he argues that it was clear she had spent extensive time in the United Kingdom with the sponsor. He further argues that it would appear from the evidence that the appellant was ready and willing to take employment as the date of decision and was only studying short courses whilst looking for work and to improve his employment prospects. It was accepted that the appellant had yet to marry or form his own family unit. He considers the appellant's own evidence relating to his education was discrepant but that given by his father who suggested the appellant was in full-time education. Given that it appeared the appellant was pursuing his own agenda with reference to education and employment it was difficult to see how emotional dependency could seriously be found in the circumstances.

25. Judge Adio found the appellant's father to be a credible witness and I come to the same conclusion. He gave his answers after reflection in a careful measured way. It is correct that he did not have an immediate ability to catalogue with precision the appellant's various courses of studies. That is not unusual and for him to give an account of that could well be indicative of something that had been rehearsed. I

found no reason to disbelieve the appellant's brother-in-law or his sister about the closeness of the continuing family ties despite the appellant's adulthood. In fact there has been no real material change in circumstances since Judge Adio found protected family life. The appellant continues with education. He has not taken employment nor has he sought employment. It may seem untypical that a mother should spend so much time away from her husband to be with an adult son, but I am satisfied that her decision to do so is driven by continuing affection and regard that is reflective of a more intense relationship than usual. I am persuaded that the appellant's mother has been with him continuously apart from the limited periods of time she has spent in the United Kingdom. I find that the family life between the appellant and his parents has continued with the same level of intensity as was the case in 2010 sufficient to engage Article 8 when the decision was made to refuse the application in 2012.

26. The Entry Clearance Officer considered that having regard to the appellant's age there needed to be more than the normal emotional ties. He had seen nothing that would lead him to conclude there were particular bonds in the appellant's case. All the evidence before me points to bonds over and above the residual affection usually found between parents and their adult children and I am satisfied that he was wrong to find Article 8 was not engaged.

27. The Entry Clearance Officer considered on a hypothetical basis the approach that should be taken even if Article 8 were engaged but concluded that any interference would be justified and proportionate in the exercise of immigration control. As acknowledged by Mr Saunders that was the only basis to justify interference. Having regard to the guidance given in *Ghising* [2013], I am satisfied that this appeal should therefore be allowed.

28. By way of summary, I have set aside the decision of the First-tier Tribunal for error of law. I have remade that decision and allow the appeal against the Entry Clearance Officer's decision.

Signed Date 16 June 2014

Upper Tribunal Judge Dawson