Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04560/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7th August 2014	**On 5th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR JITENDRA RAI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Shoeb
For the Respondent: Mr Richards

DETERMINATION AND REASONS

Introduction

1. The Appellant born on 1st January 1986 is a citizen of Nepal. The Appellant was represented by Mr Shoeb. The Respondent was represented by Mr Richards, a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application for leave to enter the United Kingdom and that application had been refused by the Respondent on 3rd January 2013. The Appellant

had appealed that decision and his appeal had been allowed by the First-tier Tribunal.

3. The Respondent had made application and had been granted permission to appeal that decision and the matter had come before myself in the Upper Tribunal firstly to decide whether or not an error of law had been made. That hearing took place on 12th June 2014 and an error of law was found for the reasons outlined within the determination.

4. The matter came before me to remake that decision.

The Proceedings - Introduction

5. I firstly noted the documents available to me in this case. Those documents consisted of:

   - The Respondent's bundle as before the First-tier Tribunal.
   - The Appellant's bundle pages 1 to 36 on the index sheet to the bundle.
   - Appellant's authority's bundle those pages 1 to 288 on the index sheet to the bundle.

6. Mr Shoeb and Mr Richards both agreed that there were no issues arising in terms of the facts of the case and Mr Shoeb indicated in those circumstances that he only intended to make submissions.

The Proceedings - Evidence

7. I firstly heard submissions on behalf of the Respondent. It was submitted the Appellant was one of six children who all lived abroad and he was well over the age of maturity. He did not qualify under the Immigration Rules and even if one looked outside of the Rules this was not an exceptional case and exclusion was proportionate.

8. On behalf of the Appellant Mr Shoeb submitted and accepted that the Appellant could not succeed under the Immigration Rules but submitted that his case was exceptional in particular relying upon authorities because the Appellant was the adult son of a Gurkha father who had never been given the opportunity to settle after discharge. It was further submitted that the Appellant although one of six children was in a different position to them because they were all leading independent lives and he continued to live in the family home and is reliant upon his father both emotionally and financially. It was submitted therefore the case merited consideration outside of the Rules and it was submitted that family life was engaged and applying the ruling in **Ghising** that could tip the balance in favour of the Appellant. It was said there was no other factors going against the Appellant such as criminality or poor immigration history.

9. At the conclusion of the hearing I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

Decision and Reasons

10. In October 2004 changes were made to the Immigration Rules according Gurkha veterans discharged in or after July 1997 the right to settle in the United Kingdom with their families bringing them in line with other former foreign and commonwealth servicemen. At the same time a policy outside of the Immigration Rules was adopted to deal with those veterans discharged before 1997 if they had existing ties with the United Kingdom. The policy allowed for the exercise of discretion to grant application to a dependant of a family unit aged 18 years or over and gave five factors for consideration in assessing whether settlement was appropriate. A further policy was introduced in 2009 indicating that children aged over 18 years would not normally have the discretion exercised in their favour and they would be expected to qualify for leave to enter or remain under the Immigration Rules in their own right or under Article 8 of the ECHR unless there were exceptional circumstances in their particular case. In 2010 a new policy came into force in many ways similar to the earlier 2009 policy although it omitted the five listed factors.

11. That history of policies outside of the Immigration Rules introduced by the Home Office, and the fairness or otherwise was considered in the case of **Gurung [2013] EWCA Civ 8**. The Court of Appeal found when specifically looking at the case of adult dependent children that an adult dependent child would not normally qualify for the exercise of discretion in line with the main applicant and that the normal position was that the child was expected to apply for leave to enter either under the Immigration Rules (paragraph 317) or Article 8 of the ECHR. It was further said that there was nothing objectionable in law in having a policy that allowed a decision maker the discretion to depart to have regard to exceptional circumstances. The court further found that the purpose of the policy had drawn a clear distinction between dependent children under 18 years of age and those who were over that age and that the policy therefore was not to facilitate the settlement in the United Kingdom of the latter category unless there were exceptional circumstances.

12. The court further found that the historic injustice accorded to Gurkha veterans was one of the factors to be weighed in the proportionality balancing exercise under Article 8 of the ECHR against the need to maintain a firm and fair immigration policy. It was further noted that the weight to be given to that factor in Gurkha cases was not substantially less than that which had been given to other British overseas citizens in earlier historic injustice cases (**R v Patel and Others [2010] EWCA Civ 17**). The court noted:

> "If a Gurkha could establish that but for the historic injustice he would have settled in the United Kingdom at a time when his child would have been entitled to accompany him as a dependent child under the age of 18, that was a strong reason for holding that it was proportionate to permit the now adult child to join the settled family and to that extent the Gurkha and British overseas citizen cases were similar."

It was therefore for the court to determine if the historic injustice factor was to be taken into account as relevant in striking a fair balance in a particular case and that it was wrong to conclude that its significance was limited. The court further noted that

the question whether an individual adult child enjoyed family life depended on a careful consideration of all the relevant facts of the particular case in reference to one of the First-tier Tribunal cases that they were considering, the court had concluded that no error of law had been made where the Tribunal had found that although the usual emotional bond between parent and their children were present the requisite degree of emotional dependence for the purposes of Article 8 was absent.

13. In the case of **Ghising [2013] UKUT 00567** the Upper Tribunal made reference to the Court of Appeal decision in **Gurung**. The Upper Tribunal had noted that in **Gurung** the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight in terms of a proportionality assessment. The Tribunal also found where Article 8 was engaged and before the historic wrong the Appellant would have been settled in the UK long ago this would 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 consists solely of the public interest in maintaining a firm immigration policy.

14. In other words when conducting a proportionality assessment with competing interests on the one hand being the historic injustice that would have allowed an Appellant to settle earlier and on the other hand the home office duty to maintain a firm immigration policy, if those were essentially the only competing features then the substantial weight to be accorded to the historic injustice would place the proportionality exercise in the Appellant's favour.

15. It is conceded in this case that the Appellant does not meet the Immigration Rules. Accordingly I need to examine his case outside of the Immigration Rules in terms of Article 8 of the ECHR the basis upon which this case is essentially submitted.

16. The Appellant's application was dated 2nd October 2012 and accordingly I need to look at this application outside of the Rules in light of recent case law which provides guidance as to the circumstances where an exercise of discretion to comply with the Strasbourg jurisprudence is appropriate.

17. There have been a number of cases including **MF (Nigeria) [2013] EWCA Civ 1192, Gulshan [2013] UKUT 640**, **Shahzad [2014] UKUT 85** and more recently **MM [2014] EWCA**. Those cases in part use similar but not identical language to express a view and the recent case of **MM** suggests that the initial part of the test in **Gulshan** namely "an arguably good case" is either unnecessary or surplus to requirements. Whilst the language varies somewhat the aim and the route being taken can be discerned. Where a decision maker has found that an individual does not fall within Immigration Rules it is necessary to consider that individual's case to see whether there are exceptional circumstances that would allow that individual to enter the United Kingdom (or remain in the United Kingdom) notwithstanding the inability to meet specific requirements of Rules. Some of the Immigration Rules allow for that individual assessment to be undertaken within the Rules themselves such as EX.1.

18. However where a set of Rules is sufficiently prescriptive that it does not allow for any element of discretion then such discretion needs to take place by an examination of the facts freestanding of the Rules. Firstly that is to ensure that the decision maker

is compliant with Strasbourg jurisprudence and current thinking. Secondly and perhaps more pertinently no set of Rules however carefully and detailed in their construction can cater for every individual case which has its own unique set of facts and common law fairness would tend to direct a decision maker therefore to look beyond a prescriptive set of Rules. However the case law indicates naturally, that if a person fails to meet a set of criteria that is nevertheless to be allowed to settle in the United Kingdom then there must be some compelling or exceptional circumstances inherent within his own case. I have also had regard to the cases above relating specifically to the case of Gurkhas.

19. The Appellant's father namely the Gurkha soldier served in the British Army for a period of about fifteen years including boy service from when he was 15 years of age until the age of 30. He was discharged at that age from the army in 1971. That is a substantial period of time ago.

20. The Gurkha father and his wife remained in Nepal from 1971 until their settlement in the UK in 2010. The decision to settle in the UK was not compulsory but a decision voluntarily undertaken by the Gurkha father and his wife and a decision taken in light of knowledge of their own personal and family circumstances which clearly they would know rather better than either myself or any other decision maker. At the time of his discharge from the army in 1971 it would seem that the father had two children born in 1969 and 1971 namely Mrs Prem Rai and Mr Sukraj Rai. Those adult children live in Nepal and Malaysia respectively. Thereafter the father and mother had four further children with this Appellant being the youngest born on 1st January 1986. Of those four children the eldest born in 1975 lives in Malaysia, the second born in 1979 lives in India, the third born in 1982 lives in Dharan in Nepal and the Appellant born in 1986 lives at the family home also in Nepal. On the basis of the father's evidence all those children are either working or married with the exception of the Appellant. He lives in the family home where the other adult children were born and brought up together with the father and mother.

21. I accept the evidence essentially unchallenged that he is unemployed and has a financial dependence on his father and mother in the UK. There was some reference to the Nepalese culture of the youngest son expected to look after the parents. I do not know whether that is genuinely a societal norm or how strictly such is applied in this day and age even if it exists. If it is a societal norm then it is within the context of Nepal in that if the parents had remained living in Nepal it might have been expected for him to look after them. They are not living in Nepal having made the choice to come to the UK and therefore such concept even if genuine has little relevance. It is also said within the father's witness statement that the youngest daughter, Chandra, born in 1982 is also dependent and also lives in Nepal although involved in study. There is no application on her behalf.

22. There is no evidence presented as to why the Appellant alone of the six children appears to have remained both within the family home and without employment. As I understand the evidence all six children had been brought up in that family home and as years have passed each in different ways have left the family home and have relocated themselves primarily in that area of Asia. The Appellant who is 29 years of age on the face of it would appear to have had a similar if not identical start

and upbringing as his other siblings but does not appear to have made the transition that the others have made.

23. The movement of the father and mother to the UK as I have indicated above was as recent as 2010 and at a time when the father was in his mid-70's. It was also a move taken at a time when they were clearly aware of the circumstances of their youngest son in terms of his lack of employment and the fact that he would be left on the face of it alone in the family home. That did not deter them from settling in the UK despite having lived for 45 years in Nepal and making the move at a relatively late stage in their lives. It is not unreasonable to presume that in terms of the welfare of their son they would not have made the move if they had any real concerns. It could not be said that settlement of their son in the UK would automatically follow nor that in any event there would not be a delay in that occurring. The Appellant is 28 years old and there is no evidence indicating any medical difficulties or concerns. Whilst he has a reliance upon his parents for income that does not place him in any particular unusual category either within this country or internationally. The concept of emotional dependence beyond the normal that can be assumed between parents and adult children is not easy to quantify. However as I have indicated above the willingness of the parents to leave when set against all the factors referred to above is some indication that they viewed their son to be able to exist independently, emotionally, physically or otherwise so long as he was provided with money unless or until he obtained employment or gained financial independence through some other means.

24. This is not a case where at the time the father retired from the army the Appellant was a dependent child and therefore would have been entitled to settle in the UK with his parents but for that historical position. It is also not a case where the Appellant's remaining siblings adult or otherwise have settled in the UK and his exclusion would therefore place him outside of the extended family. It is also not a case where the Appellant in terms of family is alone in Nepal given that he has two sisters one of whom is married with her own family.

25. Finally it is not a case where the Appellant has any evidenced difficulties, mental or physical, that would indicate a need for him to be with his parents.

26. In terms of looking at the separation and the affect upon the parents I have not found any indication on balance of a dependency beyond the normal family ties and the financial dependency. In terms of assessing any emotional impact of separation on the parents such is a difficult task but again their voluntary leaving of Nepal and leaving the Appellant to some extent assists in putting that matter into perspective.

27. I have considered firstly whether the collective position of Gurkha adult children is in itself with nothing more a sufficiently compelling or exceptional circumstance for consideration outside of the Rules. I do not find that what may be described as a class case is an appropriate method of approaching that question. In my view to comply with Strasbourg jurisprudence it is necessary for a decision maker to look at the individual and specific facts of the case before him and the question of compelling or exceptional circumstances must relate to the facts of that specific case.

28. I accept that the fact the Appellant is the adult son of a Gurkha veteran is worthy of careful consideration given the historic injustice that has been referred to in respect of Gurkhas. In examining the impact on the family as a whole including the parents it is also worthy to note the service afforded to this country by the father for which he has my admiration. There are however no other features in this case that render the specific facts of this case when taken as a whole sufficiently compelling or exceptional as to allow a departure from normal Immigration Rules. If the Appellant had been under the age of 18 or had all his other adult siblings settled in the UK those would have been features that would have rendered his circumstances sufficiently compelling to warrant a departure from the normal Rules. Those factors however do not exist.

29. I have further noted the comments of the Court of Appeal as referred to at paragraph 24 of the case of **Ghising**. The Court of Appeal said:

> "The flexibility of the exceptional circumstances criterion is such that it does not require the historic injustice to be taken into account at all. It certainly does not prescribe the weight to be given to the injustice if indeed it is to be taken into account. The requirement to take the injustice into account in striking a fair balance between the Article 8(1) right and the public interest in maintaining a firm immigration policy is inherent in Article 8(2) itself and it is ultimately for the court to strike that balance. This requirement does not derive from the fact that the policy permits an adult dependent child to settle here in exceptional circumstances."

That underscores the need to look at each case on its own facts in determining whether there are exceptional circumstances and that in itself is in line with current case law referred to above when considering Article 8 outside of the Immigration Rules.

30. Whilst not necessarily an easy decision to make for the reasons provided above I do not find there are exceptional circumstances in the Appellant's case such that he should be allowed entry clearance outside of the Immigration Rules under the terms of Article 8 of the ECHR.

Decision

31. I dismiss this appeal under the Immigration Rules.

I dismiss this appeal under the Human Rights Act.

Signed Date

Deputy Upper Tribunal Judge Lever