Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/10964/2013
OA/10965/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 7 July 2014	**On 29th July 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MISS RANJEENA PUN (FIRST APPELLANT)
MISS SHANTI PUN (SECOND APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellants: Mr H Shoeb, Solicitor
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Entry Clearance Officer has been granted permission to appeal the decision of First-tier Tribunal Judge Charlton-Brown allowing the appeals of the appellants against refusal to grant them entry clearance to settle as the adult children of their sponsor, their father Mr Phakta Bahadur Pun.

2. The appellants who are sisters are both citizens of Nepal born respectively on 15 December 1988 and 25 April 1984. Their father and mother and

their brother were granted settlement visas, although the two appellants were not. Their father was a former member of the brigade of Ghurkhas, having served from April 1972 until August 1987. The appellants were now the only members of the family unit remaining in Nepal. They are in full-time education, unemployed and entirely dependent financially on their father.

3. At the hearing the judge was told that the appellants could not succeed under the substantive Immigration Rules and therefore the appeal was to be dealt with solely on the basis of Article 8 of the ECHR, with the alternative suggestion that the policy had not been exercised properly in respect of the appellants and there was an argument that the cases should be remitted to the respondent for such consideration.

4. The judge did not consider that it was appropriate for these cases to be remitted to the respondent because it appeared to her from reconsideration of the refusal notices that there was a reference to discretion and "exceptional circumstances" and in the review completed by the Entry Clearance Manager, again it appeared that the respondent had arguably applied herself to the question of whether or not it was appropriate to exercise discretion.

5. In considering the appeal on its substantive merits with reference to Article 8 of the ECHR, the judge found that there was family life between the sponsor and other family members now present in the UK and the two appellants were based in Nepal. The two appellants were living together in a property that was constructed by their father. They are unmarried, in full-time education and financially dependent on their father.

6. The judge found that it was not disputed by the respondent that the two appellants had always lived with their parents until they came to the UK, and neither has founded a family of their own. The judge accepted the submission made on behalf of the appellants that at all material times the intention of the family had been to effect a reunion of the appellants with their parents in the UK. The other close family member, their brother was successful in being granted settlement together with his parents.

7. The judge found the witness credible and therefore accepted his evidence that he had thought of coming to the UK but the opportunity simply did not exist. In considering whether or not there was interference with the appellant's family life, the judge relied on **Ghising (Family Life – Adults – Ghurkha Policy) Nepal [2012] UKUT 00160 (IAC)** which said that where the respondent had granted settlement to the Ghurkha sponsor, it had therefore been accepted that his future lay in the UK and it would be unreasonable to expect him to return to Nepal. The judge also relied on **MM [2013] EWHC 1900** where Blake J made it clear that there was no proper distinction to be observed between entry clearance and leave to remain cases with regards to interference, and a person with settlement in

the UK was entitled to found their family life, even if that included family members abroad.

8. The judge then considered proportionality. The judge noted that the conclusion in the notices of decision by the respondent was that Article 8 was not engaged and, even if it were, the respondent's decisions were proportionate. The judge found that the recent case law does not assist the respondent. She found that Lord Dyson MR in **Gurung** at paragraphs 40 to 44 made it clear that the adult dependent child of a Ghurkha veteran who can establish an Article 8(1) right, had such a strong claim to have that right vindicated, notwithstanding the potency of the legitimate aim argument, if they could show that they would have settled in the UK years before, had that been possible. Further, in **Ghising (Ghurkhas – BOCs: Historic Wrong; Weight) [2013] UKUT 00567 (IAC)** the Upper Tribunal held that the historical wrong would ordinarily determine the proportionality assessment where the respondent only relies on fair immigration policy as the legitimate aim.

9. The judge found that to be the respondent's position. She found on the available evidence, taking into account the credible, albeit brief evidence she heard from the UK-based sponsor Mr Pun, that had it been possible, he would have settled in the UK on an earlier occasion, but that simply was not possible. Indeed, as with many others in his position, when on being discharged from the army in 1987, he went back to Nepal but he did not in fact stay there for longer than a year before he went to Brunei. Self-evidently, this was because he needed to find employment that was not available to him in Nepal which was of course why he went to Brunei. In summary the judge considered that the appellants have established not only that they have family life with the sponsor and other UK based families, but this would be interfered with particularly taking account of recent developments in case law that such interference is not necessary and further, that it is not proportionate. She accordingly allowed the appellants' appeals under Article 8 of the ECHR.

10. Mr Kandola relied on the grounds of appeal submitted on behalf of the respondent upon which permission was granted. He submitted that the judge having accepted Counsel's submission that the Immigration Rules could not be met, did not at that stage place proper weight on the failure to meet the Immigration Rules. Following **Nagre** and **Gulshan** the judge needed to consider if there were exceptional circumstances as to why they could not meet the Immigration Rules. Their failure to meet the maintenance and accommodation requirements of the Immigration Rules was relevant to the Article 8 exercise. The judge moved to consider Article 8 without proper direction. He submitted that the fact that the sponsor was a Ghurkha did not of itself exempt the judge from a consideration of **MF**. The judge had to consider whether their case disclosed exceptional circumstances.

11. Mr Kandola submitted that the ECO considered that because of the exceptional position of Ghurkha veterans and their families, the Secretary of State had made special provisions for their entry to the UK outside the Immigration Rules as an acknowledgement that it was in the public interest to remedy the injustice. As the judge had found that the appeal could not be remitted to the ECO this meant that she was satisfied that the ECO had properly considered and applied the policy and this meant that there were no exceptional circumstances in this case. The judge should have stopped there as **Gulshan** and **Nagre** say that if there are no exceptional circumstances then there is no need to go on to consider Article 8. Therefore the judge's consideration of Article 8 was an error of law.

12. Mr Shoeb relied on his response to the grant of permission.

13. I accept Mr. Shoeb's argument in the response that the judge's finding that there is family life between the appellants, their father and other family members in the UK discloses no error of law in light of the evidence relied on by the judge to reach that finding.

14. More importantly I accept his submission at paragraph 13 of his response that the exceptionality of appeals relating to the adult dependent children of former Ghurkha servicemen is discussed in the cases of **Ghising (Family Life – Adults – Ghurkha Policy) Nepal [2012] UKUT 160**, **Ghising and Others [2013] UKUT 567 IAC** and **R (Gurung) [2013] 1WLR 2546**.

15. In this case the judge has found that Article 8 is engaged and, but for the historic wrong, the appellants would have settled in the UK long ago. The Upper Tribunal held that this will ordinarily determine the outcome of the Article 8 proportionality assessment in any 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. This was relied on by the judge at paragraph 17.

16. In **Ghising and Others** the Upper Tribunal also held that if the respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors being on the appellant's side with the balance.

17. In this case the respondent could not point to any bad immigration history and or criminal behaviour on the part of the appellants.

18. Consequently I find that the judge adopted the right approach as set out in **Ghising and Others**. In so doing the judge did not err in law.

19. The judge's decision allowing the appeals of the appellants shall stand.

Signed Date

Upper Tribunal Judge Eshun