Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/07068/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 July 2014	**On 4 July 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

Appellant

and

Krishna Gurung
[No anonymity direction made]

Claimant

Representation:

For the claimant: Mr H Shoeb, instructed by Howe & Co
For the appellant: Ms K Pal, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Krishna Gurung, date of birth 9.3.87, is a citizen of Nepal.

2. This is his appeal of the Secretary of State against the determination of First-tier Tribunal Judge Canavan, who allowed the claimant's appeal against the decision of the Secretary of State, dated 21.2.13, to refuse his application made on 23.11.12 for entry clearance to the United Kingdom as the adult dependent son of Surjabahader

Gurung, an ex-Gurkha, pursuant to paragraph 317 of the Immigration Rules and Home Office policy.

3. The Judge heard the appeal on 11.2.14.

4. First-tier Tribunal Judge Cruthers granted permission to appeal on 24.3.14.

5. Thus the matter came before me on 13.5.14 as an appeal in the Upper Tribunal.

6. There was some confusion, which the parties were not able to resolve at the hearing on 13.5.14 and I therefore adjourned the appeal to a date to be fixed as soon as possible, for the respondent to consider its position.

7. The papers in the file before me contain two different Notices of Immigration Decision issued by the Entry Clearance Officer. The first, dated 20.2.13, deals with the claimant's application as an adult dependent relative under EC-DR 1.1 of Appendix FM and the Home Office Policy in chapter 15 section 2A 13.2, and following an interview on 11.1.13.

8. The second decision is dated the following day, 21.2.13, and purports to deal with the same application from the same applicant with the same reference number and post. This one purports to deal with the application under paragraph 317 of the Immigration Rules, as well as the same Home Office Policy.

9. The first 4 paragraphs of both documents are identical. Ms Ong was unaware of the notice dated 20.2.13, but when she dug through the file she found a copy of the 21.2.13 notice. She had prepared for the hearing on the assumption that the decision being appealed had addressed Appendix FM.

10. For his part, Mr Shoeb had the notice of 20.2.13 but was unaware of 21.2.13. Despite a short adjournment to try and unravel the confusion, it was not possible to determine which decision was valid.

11. My concern was that the decision of the First-tier Tribunal was obviously based on the earlier notice of decision, dealing with Appendix FM, but the notice of decision of 21.2.13 may have superseded that of the previous day, rendering the notice of decision dated 20.2.13 no longer valid. This was highly relevant to the appeal before me, as if the First-tier Tribunal appeal had proceeded on the basis of the wrong decision, it would need to be set aside. If the 'correct' decision incorrectly made the decision on the basis of paragraph 317, which does not seem to apply in relation to an application made by this claimant after the introduction of Appendix FM from July 2012, then the First-tier Tribunal should have found that there was no decision in accordance with the law and allowed the appeal to that limited extent.

12. It was not clear to me that there can be two valid and extant decisions in relation to a single appeal. It may be that the latter decision vitiates the earlier decision, in which case the Secretary of State may need to withdraw one or both decisions and make a fresh decision.

13. At the hearing before me on 3.7.14 both representatives concurred that the appeal had been made against the decision of 20.2.13 and thus that the decision of 21.2.13 was not relevant. Enquiries had been made by the Secretary of State, but it was still not clear how the purported decision of 21.2.13 came into being.

14. In the circumstances, I proceed on the basis that the decision under appeal is that which related to consideration under Appendix FM.

15. In essence, the grounds of appeal of the Secretary of State are that the judge erroneously considered at §13 that the Tribunal was bound to conduct a two stage process of consideration under the Rules, followed by consideration under article 8 ECHR. That is not a correct statement of the law as it stood at the date of promulgation of the decision in March 2014.

16. In summary, the Tribunal need not consider article 8 outside the Rules, unless there are arguable good grounds for considering that there are compelling circumstances which would justify, exceptionally, allowing the application under article 8 on the basis that the decision produced a result that was unjustifiably harsh. The line of authorities begins with R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin), endorsed by the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192, Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC), and Nasim and others (Raju: reasons not to follow?) [2013] UKUT 00610(IAC), followed in respect of article 8 in Nasim & others [2014] UKUT25. Collectively, these cases have held that the Immigration Rules are intended to be a complete code including for consideration of article 8 family and private life rights. Latterly, Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), held that the new Rules are a complete code for article 8 where a consideration of exceptional circumstances and other factors are required within the Rules. Only if "after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."

17. The First-tier Tribunal Judge was in error to consider at §13 that the two-stage process has been approved in the Court of Appeal. MF (Nigeria) in the Upper Tribunal was overturned in the Court of Appeal.

18. Thus before going on to consider article 8 ECHR, the judge should have considered whether there were compelling circumstances insufficiently recognised in the Immigration Rules. However, Mr Shoeb submitted that the error was not material as there are in this case compelling circumstances justifying a consideration of article 8.

19. Without needing to set out the reasons why, is clear that the appellant could not meet the current Immigration Rules for settlement in the UK, either under Appendix FM as a dependent relative, or private life under paragraph 276ADE.

20. I find for the reasons set out herein that there are compelling circumstances in this case, even if not identified as such by the First-tier Tribunal Judge, for going on to consider article 8 ECHR and thus there was no material error in doing so without first identifying the compelling circumstances.

21. The judge's assessment of the evidence as a whole including the historic injustice aspect of the appellant's family circumstances demonstrates that there are here such compelling circumstances that are insufficiently recognised in the Immigration Rules.

22. The appellant is the adult dependant child of a British Gurkha veteran. The judge carefully considered the circumstances of the family's migration to the UK, leaving this appellant behind to continue his studies in Nepal and perhaps also for financial reasons of being unable to afford to take him with them, though that was not entirely clear from the evidence. His mother remained with him until 2010 and has repeatedly visited him for long periods of time, demonstrating that the family unit was continuing with emotional dependence of the appellant on his mother, even though he was 21 when his father and sister over 18 left in 2008. His sister's application was granted even though she was over 18 at the time. Perhaps most significantly, the judge found that but for the historic injustice done to his father, the appellant would have been settled in the UK with his family whilst a child. I am satisfied that these can properly be regarded as compelling circumstances insufficiently recognised in the Immigration Rules. I note that the Secretary of State had discretionary policies to deal with historic injustice applications, in recognition that this was insufficiently recognised in the Immigration Rules.

23. Having conducted an article 8 family life assessment the judge found, for cogent reasons stated in the determination, that there was family and that the interference occasioned by the decision was sufficient to engage article 8. The judge then proceeded from §21 to consider proportionality.

24. The judge grappled with the Kugathas v SSHD [2003] EWCA Civ 31 issue from §17 and took into account the cultural norms in Nepal that adult children will often remain living in an extended family household until marriage. At §19 the judge concluded that the family had retained close ties despite the appellant being a mature adult, and that he is wholly reliant on his father for financial support and his mother for practical and emotional support. In effect, the judge concluded that but for the historic injustice the appellant's father would have settled in the UK at a time when the appellant would have been able to accompany him as a dependent child under the age of 18. The judge also concluded that the family unit was not broken up by the decision for the appellant to remain behind to complete his studies.

25. In Ghising (family life –adults –Gurkha policy) [2012] UKUT 00160 (IAC) the Upper Tribunal held that there can be no blanket rule with regard to adult children and each case should be considered on its own fact, to decide whether family life exists within the meaning of article 8. The historic injustice and its consequences suffered by former members of the Brigade of Gurkhas are to be taken into account when assessing proportionality. Special provision has been made for entry to the UK outside the Immigration Rules as an acknowledgement that it is in the public interest to remedy the injustice. The case suggests that it is not inherently unfair or in breach of their human rights to distinguish Gurkha veterans, their wives and minor children who will generally be given leave to remain, and their adult children who will only be given leave to remain in exceptional circumstances. The scheme that the Secretary

of State has developed is capable of addressing the historic wrong and contains within it a flexibility that in most cases will avoid conspicuous unfairness.

26. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567 (IAC), the Upper Tribunal confirmed that where it is found that article 8 is engaged and that 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. They will not necessarily succeed if the respondent can point to matters over and above the public interest in maintaining a firm immigration policy (examples include a bad immigration history or criminal behaviour) which may be sufficient to outweigh the powerful factors bearing on the appellant's side of the balance. At §22 the First-tier Tribunal Judge found no such compelling policy issues.

27. The judge took the principles established in these cases into account in the proportionality balancing exercise. The judge recognised that had the appellant not been the adult dependent child of a Gurkha veteran, there would be no particularly compelling circumstances to justify granting the application outside the Immigration Rules, but on the basis of those same principles, found no factors to outweigh the increased weight to be accorded to the appellant on the family's historic injustice circumstances. Of particular signifiicants is the finding at §23 that but for the denial of the opportunity for settlement when he was discharged from the army the appellant could have been settled in the UK as a child.

28. A different judge may have reached a different conclusion, but this judge has set out cogent reasons for concluding that the there is family life, that the decision engaged article 8 and that in the proportionality assessment balancing exercise, the decision to exclude the appellant was disproportionate.

Conclusion

29. For the reasons set out above, I find that there was no material error in the making of the determination such as to require it to be set aside.

Decision

The decision of the First-tier Tribunal stands and the appeal remains allowed.

Signed: Date: 3 July 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no award.

Reasons: No fee was payable by the appellant for the Upper Tribunal proceedings.

Signed: Date: 13 May 2014

Deputy Upper Tribunal Judge Pickup