



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: OA/01577/2013

**THE IMMIGRATION ACTS**

**Heard at Bradford**

**On 8<sup>th</sup> November 2013**

**Determination  
Promulgated**

**On 25<sup>th</sup> November 2013**

**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Claimant

**and**

**MINA GARBUJA PUN**

Respondent

**Representation:**

For the Claimant: Mrs R Pettersen, Home Office Presenting Officer

For the Respondent: Mr S Jaisri of Counsel instructed by Sam Solicitors

**DETERMINATION AND REASONS**

1. This is the Secretary of State's appeal against the decision of Judge Adio made following a hearing at Hatton Cross on 28<sup>th</sup> August 2013.

**Background**

2. The claimant is a Nepalese citizen born on 1<sup>st</sup> January 1974. She appealed against the decision of the Secretary of State dated 5<sup>th</sup> June 2012 to refuse to grant her entry clearance as the dependant daughter of an ex-Gurkha soldier. Her father was issued with a settlement visa on 4<sup>th</sup> July 2011 and entered the UK on 7<sup>th</sup> August 2011.
3. The claimant has a physical disability arising from her having been the victim of a bombing in Nepal in 2004. The Secretary of State was satisfied that she was disabled as claimed, but she was able to perform everyday tasks and not under any medication. She refused the application on the grounds that she was not satisfied that the claimant was unable to obtain the required level of care in Nepal and in any event she could not meet the accommodation and maintenance requirements of the Immigration Rules.
4. The judge dismissed the appeal in respect of the Rules both in relation to the requirements for entry clearance and under Article 8 with reference to Appendix FM, paragraph E-ECDR. He was satisfied that the claimant's ability to do everyday tasks was limited but she could go to a shopping area near her house and live near a government help post and over the years had received medical care from the government.
5. With respect to the financial requirements of the Rules, there was accommodation available for her in the UK and the sponsor's benefits would not impact on the claimant. He accepted that the sponsor would keep to his undertaking and his daughter would not ask for benefits when she came to the UK.
6. He allowed the appeal on Article 8 grounds, accepting that the claimant was being looked after by her parents before they came to the UK in 2011 and she was financially, physically and emotionally dependent upon them. She was still financially dependent on her parents; the fact that the sponsor came to the UK was not sufficient to break the family life between them.
7. He concluded:

"I therefore find that there is financial and emotional dependency on the sponsor and the fact that family life existed before the sponsor came to the UK and that has not been broken."
8. The family life which the parties enjoyed previously was not being enjoyed in the same way at present because they were not living under the same accommodation but were communicating by phone. The ultimate question was whether the interference with the family life was proportionate.
9. He wrote as follows:

"In the present case I have taken into account the historical injustice with regards to ex-Gurkhas and their family members. I have also

taken into account the particular circumstances of this case that the appellant is disabled and she is suffering from depression as she herself answered to question 35 stating that she still has bomb particles inside her whole body and unable to move freely and suffer from depression.

This in no way negates my earlier finding under the Immigration Rules as the requirement of the Rules were very clear that she has to be able to perform everyday tasks. The appellant is able to perform everyday tasks but in a very limited way and not in a way that an able bodied person can do so. The appellant I accept is stuck in a room and living by herself and on the long run this does not help her all round family life. I find that for the appellant to function adequately she would have to be around her parents who have cared for her all these years. The appellant is unable to marry and is unable to work and the only little joy she can have out of life is by living together with her parents who have cared for her all her life.

On the basis of the historical injustice which applies to ex-Gurkha soldiers and their family members and the fact that the circumstances of this case is such that the appellant is living alone and suffering from depression being away from her parents upon whom she is dependent I find that it is disproportionate to separate the appellant from her parents. It was always the intention of the sponsor to reunite his family in the United Kingdom and that is the reason why he came to the United Kingdom even if it meant leaving the appellant in Nepal for a short period of time. I therefore find that the appellant's case succeeds under Article 8 of the Human Rights Convention."

### **The Grounds of Application**

10. The Secretary of State sought permission to appeal on the grounds that the claimant had not demonstrated that the family life enjoyed goes beyond mere emotional ties. The claimant has some independence by managing without her sponsor's support since their departure in 2011. There is no interference with family life as it was at the date of the Entry Clearance Officer's decision since the status quo can continue.
11. The judge allowed the appeal on the basis of an historic injustice suffered by Gurkhas, who were not allowed to settle in the UK with their families before 1997. However the judge misdirected himself in law. It is for the Gurkha to show that, but for the historic injustice, he would have settled in the UK at a time when his (now) adult child would have been able to accompany him as a dependent child under the age of 18. Furthermore the Tribunal should have considered the particular military service of the sponsor - UG Nepal [2012] EWCA Civ 58. Historic injustice was relevant but not determinative and just one of several factors to be weighed against the need to maintain a firm and fair immigration policy.

12. On 1 October 2013 permission to appeal was granted by Judge Saffer for the reasons stated in the grounds.

### **Submissions**

13. Mrs Pettersen relied on her grounds. The judge had found that the claimant lived near a government help station and was not in receipt of regular treatment. He had not applied the Kugathas test. Both parents had chosen to leave her behind. The judge's conclusion did not match up with the evidence.
14. With respect to the historic injustice point, the sponsor had enlisted in 1959 and had been discharged from the army in 1970. The claimant, who was born in 1974, was not born at the point when her father did service with the Gurkhas. By the time the policy had changed in 1997 the claimant was already an adult and it was therefore not clear why any historic injustice claim made by her could succeed.
15. Mr Jaisri submitted that the judge had considered all of the relevant facts and reached a conclusion open to him on the evidence. He was aware of the correct test to be applied and was entitled to conclude that the dependency which the claimant enjoyed up until 2011 was not broken by her parents coming to the UK.
16. The 1997 change in policy meant that any Gurkha should have been able to settle in the UK after discharge from the army. The relevant date was not 1997 when the policy changed but, in the Sponsor's case, anytime after 1970, the date when he left the army. There was evidence in his statement that he would have made the application earlier had the policy existed when the claimant was a child. In any event the judge did not regard the policy as determinative but took it into account as a part of the assessment of the case as a whole.

### **Findings and Conclusions**

17. Ground 1 amounts to a disagreement with the decision. On the facts of this case, the claimant, although an adult, had always lived with her parents and had been cared for by them following the injuries which she suffered in a bomb blast in 2004. The judge did not express himself particularly clearly but he was aware of the correct test to be applied and that adult children could establish family life depending on the facts. The lack of the citation of Kugathas does not fatally undermine the determination. It was open to the judge to find family life existed between father and daughter before the sponsor settled in the UK, and it had not been broken by his arrival here. The fact that the claimant could perform basic tasks for herself and was able to go to local shops does not undermine that finding.

18. In the sponsor's statement he said that "in Nepalese culture we look after our children until they marry". No challenge has been made by the Secretary of State to the his evidence and it is entirely understandable that parents would feel an obligation to care for a disabled daughter. She continues to be financially dependent on her parents and the family remain in communication with each other.
19. The judge was entitled to conclude that there was financial and emotional dependency, which is evidence of family life, as at the date of decision in this case.
20. With respect to the historic injustice argument, again the determination could be better expressed. Mr Jaisri is right to state that the fact that the policy came into existence after the claimant gained her majority does not mean that she is not entitled to benefit from it. There was evidence before the judge to show that it was the sponsor's intention to bring his daughter to the UK had he been allowed to do so. In his statement he said:

"My daughter was not allowed to apply for settlement in the UK with her parents before she turned 18. If she had been allowed I would have brought her with us to settle in the UK."
21. In any event it is absolutely clear from the determination that this was not the determining factor. The judge heard oral evidence from the sponsor and his wife and was clearly struck by the bond between this family and the extent of their inter-dependence. That was an assessment for him to make.
22. The Secretary of State's challenge amounts to a disagreement with the decision.

**Decision**

23. The judge's decision stands. The claimant's appeal is allowed.

Signed

Date

Upper Tribunal Judge Taylor