



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

Appeal Numbers: OA/02975/2013
OA/02977/2013

THE IMMIGRATION ACTS

Heard at Field House

On 29th October 2014

**Decision and Reasons
Promulgated**

On 10th December 2014

Before

DESIGNATED JUDGE MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GANA PRASAD RAI (FIRST APPELLANT)
SUNA RAI (SECOND APPELLANT)**

Respondents

Representation:

For the Appellants: Mr Melvin, Home Office Presenting Officer

For the Respondents: Mr Jesurum, Counsel for Howe & Co Solicitors, Brentford

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellants are citizens of Nepal born on 30th August 1941 and 26th February 1950 respectively. They appealed against the decision of the Respondent dated 5th December 2012 refusing to grant them entry

clearance to settle in the United Kingdom as an ex-Ghurkha and his wife under the Immigration Directorate Instructions IDI Chapter 15 Section 2A, Annex A. Their appeals were heard by Judge of the First-tier Tribunal R G Walters and dismissed in a determination promulgated on 16th May 2014.

3. An application for permission to appeal was lodged and permission was refused by Judge of the First-tier Tribunal Landes on 2nd July 2014. Permission was however granted by Judge of the Upper Tribunal Perkins on 16th September 2014. The First-tier Tribunal dismissed the appeal of the Appellants being a former Ghurkha and his wife on the basis that the Ghurkha had had two periods of military detention which the judge found amounted to adverse information of a serious nature and the Ghurkha had previously attempted to register his daughter with a fraudulent date of birth. The grounds state that the Appellant's daughter was not a dependant on the application and no false date of birth was put forward for her in it, so the application should not be refused under paragraph 320 as this referred only to a failed attempt to deceive that led to nothing. The grounds also state that the reasons for the two periods of military detention did not reach the threshold of adverse information of a serious nature. The IDI states that in cases where there is evidence of serious criminal activity the normal threshold has to be met in order for the case to be considered for refusal of settlement ie a custodial sentence of at least twelve months if the offence was committed in the UK or if committed outside the UK the offence would have been punishable by a custodial sentence of at least twelve months if it had occurred within the UK.
4. This is an error of law hearing and I shall refer to the First Appellant being the ex-Ghurkha, as "the Appellant" throughout.

The Hearing

5. Counsel for the Appellant submitted that this is not an ordinary application for settlement in the United Kingdom. This application is based on a clear policy and this policy imposes a threshold which has to be met. He submitted that what has to be decided is whether the threshold was reached or not reached by the actions of the Appellant.
6. Counsel submitted that he is not challenging the judge's findings. He submitted that Ghurkhas are victims of historic injustice. Until 1997 they had no opportunity to apply for settlement in the United Kingdom and from 2004 until 2008 there was a restrictive policy about this. I was referred to the case of **Limbu & Others [2008] EWHC 2261 (Admin)**. He submitted that all service men are entitled to recognition but Ghurkhas are in a separate category. He submitted that in the said case of **Limbu** it is stated that ex-Ghurkhas can apply for indefinite leave to enter the United Kingdom following their discharge in Nepal. He submitted that the service of the Ghurkhas exceeds the service of a normal member of the forces and so is worthy of greater weight. He submitted that Ghurkhas made greater sacrifices and I was referred to the case of **R (Purja &**

Others) v Ministry of Defence [2003] EWCA Civ 1345. At paragraph 17 of that case it is explained that Ghurkhas had much more severe conditions attached to their service than British soldiers. He submitted that Ghurkhas discharged before 1997 were wronged and that is why the policy was put into place. He referred me to the IDI and the discretionary settlement criteria. This states it is only where adverse information of a serious nature is received about the applicant, for example evidence of any serious criminal activity, that the application will normally be refused. He submitted that the Appellant in this case is eligible for settlement in the United Kingdom. He submitted therefore that this case turns on the threshold which has to be met in order for a case to be considered for refusal of settlement. He submitted that in this case that threshold has not been reached. He submitted that there is a presumption in favour of admission to the United Kingdom and what is understood is that any criminal activity which results in a custodial sentence of at least twelve months may be considered as adverse information of a serious nature. He submitted that that is not the case here. He submitted that the threshold for admission to be refused has not been met.

7. Counsel referred to the Appellant's attempt to mislead the Records Office by giving an incorrect date of birth for his daughter. He submitted that this went no further. No application was granted based on this evidence. He submitted that the Appellant's daughter is not a party to this application.
8. In this case the Appellant was detained on one occasion for 24 days and on one occasion for seven days.
9. I was referred to paragraph 39 of the determination of Judge Walters in which it is stated that the Entry Clearance Officer was justified in finding that these two periods of detention could be seen as adverse information of a serious nature. This paragraph refers to the Entry Clearance Officer being of the view that if he were to exercise discretion in the Appellant's favour he would not be carrying out the intentions of the scheme and would bring the scheme into disrepute. He submitted that the wrong test has been applied by the Entry Clearance Officer and the judge. He submitted that the actions of the Appellant and his punishment fall well short of what is required by the policy under the definition, adverse information of a serious nature.
10. Counsel referred to paragraph 40 of the determination in which the judge states that he does not find the Entry Clearance Officer's reasoning to be sound. He states that he does not agree that the two periods of military detention would have disqualified the Appellant at the date of discharge of 20th August 1970, but he goes on to find that the Appellant's attempt to fraudulently register his daughter's date of birth of 14th December 1993 is adverse information of a serious nature and it justifies the Entry Clearance Officer's decision to refuse the Appellant's settlement. He submitted that what has to be considered is whether this action of the Appellant would have led to twelve months' imprisonment in the United Kingdom. He

submitted that it is likely there might not have been any conviction or any prosecution for this action and I was asked to look at the nature of the Appellant's service. He served for over ten years from 21st October 1958 to 29th August 1970. He was promoted to Lance Corporal and was honourably discharged. He served the Crown in conflict. He submitted that this man should have been entitled to settlement when he completed his service, but because of the injustice done to Ghurkhas he did not get settlement.

11. He submitted therefore that the determination cannot be sustained. He submitted that this is not a normal case. This is the case of a Ghurkha and Ghurkhas were wronged. He submitted that the judge has not given a proper explanation of why he finds the Appellant trying to alter his daughter's date of birth brings his claim over the threshold required for settlement not to be granted.
12. The Presenting Officer made his submissions submitting that what Counsel appears to be saying is that whatever lies a Ghurkha tells the authorities, because he is a Ghurkha that is acceptable and he should be granted settlement.
13. The Presenting Officer submitted that the Entry Clearance Officer found that the Appellant had deliberately misled the authorities for a gain for his family and he submitted that in the United Kingdom this could well have led to a twelve month sentence. He submitted that this was a factual point taken by the Entry Clearance Officer and upheld by the judge and there is therefore no reason for the determination to be set aside. He submitted that the judge gave his reasons for dismissing the appeal. He refers to discrepancies in the Appellant's interview relating to his first detention and also contradictions in his evidence about his daughter's date of birth. He did not believe the Appellant's evidence that the Welfare Officer advised him to do this. He submitted that the facts are not different to what was considered by the Entry Clearance Officer and the judge. The Appellant entered into a deliberate fraud and he submitted that the judge was well within his discretion to find his fraud a serious matter. He submitted that this issue points directly to the character of the Appellant. He submitted that it is clearly in his character to deceive the authorities and that I should find that the judge was correct in his decision. He submitted that Counsel cannot balance this against any injustice suffered by the Ghurkhas. The Appellant was a civilian when he applied and military law does not apply. He submitted that the judge's decision is correct.
14. The Appellant's representative submitted that he is not trying to say that lying is alright and that a Ghurkha can do whatever he likes, but any lie given by the Ghurkha must take the matter over the threshold. He submitted that the judge finds the deception to be deliberate but he submitted that the deception was not sufficiently serious to take him over the threshold. He submitted that for the fraudulent act it would be difficult

to say that the Appellant would have been sentenced to twelve months or more in prison.

15. He asked me to look at the word “only” in that the policy states it is only where adverse information of a serious nature is received about the applicant, for example evidence of any serious criminal activity, will the application normally be refused. He asked me to look at the nature of the offence, the fact that the attempt to defraud was unsuccessful and the fact that there was no immediate financial gain. He submitted that the Appellant was awarded the General Service medal and he served in the conflict and he submitted that all these issues have to be taken into account. He again referred me to paragraph 40 of the determination in which the judge states that the Appellant would not have been disqualified for the two periods of military detention, but he goes on to state that because of the Appellant’s attempt to fraudulently register his daughter’s date of birth as 14th December 1993 thus justifies the Entry Clearance Officer’s decision to refuse settlement. He submitted that the judge failed to draw logical conclusions from the evidence and that the determination should have been overturned.

Determination

16. The determination makes it clear that the judge was aware of all the facts of the case. He used the correct standard of proof. At paragraph 19 the judge finds that the Entry Clearance Officer did not properly exercise his discretion when he found that the Appellant’s behaviour, while in service amounted to adverse information of a serious nature. He gives reasons for this finding.
17. He then goes on to deal with the false details given by the Appellant so that his daughter would be seen as a minor dependant and thus eligible for settlement in the UK. At paragraph 25 he refers to the comment made by the official in charge of the “kindred roll” and the appellant’s request for registration of his daughter Santoshi, (date of birth 14th December 1993) which was rejected due to the lack of the verification of the gap period and her NPP. He goes on to refer to the telephone call between the Entry Clearance Officer and the Appellant in which the appellant admits that he gave a false date of birth for Santoshi and states “I thought I was doing what would help her to get a United Kingdom visa, but I was scolded by the Ghurkha officer telling me it is wrong and I withdrew the request”. In the Visa Application Form Santoshi Rai’s current date of birth is given as 11th June 1981.
18. The judge then refers to his witness statement and the contradiction in his previous evidence compared to this statement. The judge states that the Appellant suggests that it was the Welfare Office who advised his wife to fraudulently alter Santoshi’s date of birth so she would be eligible for UK settlement but the judge does not accept the Appellant’s evidence about what occurred during the telephone interview. At interview the appellant admitted that it was he who sought to register Santoshi with a different

date of birth, twelve years younger than she actually is. The judge finds that the Appellant's attempt to register Santoshi with a false date of birth was clearly an act preparatory to obtaining settlement for her in the UK. He states "Obviously the First Appellant must have taken the view that this would not succeed as he had been 'scolded' by the Ghurkha officer telling him it's wrong". The judge weighed this up and decided that this evidence is adverse information of a serious nature.

19. The judge finds that the Entry Clearance Officer was right to state that this conduct falls well short of the standards envisaged when referring to the unique nature of the service given by the Brigade of Ghurkhas. He refers to the Entry Clearance Officer stating that if he were to exercise discretion in the Appellant's favour it would not carry out the intentions of the scheme and if he exercised discretion in the First Appellant's favour he would "bring the scheme into disrepute". The judge clearly has in his mind that the scheme was designed to right a historical wrong, but although he would have been prepared to allow the appeal in spite of the military detentions he finds that because of this Appellant's attempt to fraudulently register his daughter Santoshi with a date of birth of 14th December 1993, on the kindred roll, this is adverse information of a serious nature which justifies the Entry Clearance Officer's decision to refuse the Appellant's settlement.
20. The judge has clearly considered all the evidence before him and has explained why and how he came to his decision. It is not known what sentence would have been conferred on the Appellant had he made this fraudulent attempt but the judge found that it could be as much as twelve months in prison.
21. The judge has reasoned his decision properly and there is no error of law. He in fact finds that to allow this appeal would be against the intentions of the scheme and the exercise in the Appellant's favour would bring the scheme into disrepute.

Notice of Decision

22. There is no error of law in the judge's determination. The First-tier Tribunal's decision must stand.

No anonymity direction is made.

Signed

Date **29th October 2014**

Judge Murray
Judge of the Upper Tribunal