Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/03541/2013
OA/03542/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 February 2014	**On 14 February 2014**
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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MANMAYA GURUNG (FIRST APPELLANT)
DINESH GURUNG (SECOND APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

Representation:

For the Appellants: Mr D Saldanha, Solicitor, Howe & Co
For the Respondent: Miss A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants appeal with permission against the determination of First-tier Tribunal Judge Wright promulgated on 14 October 2013 in which he dismissed the appellant's appeal against the decisions of the respondent made on 6 December 2012 to refuse him entry clearance to the United Kingdom.

2. The first appellant was born on 3 August 1966; the second appellant on 9 February 1990. Both are citizens of Nepal. The first appellant is married to Prembahadur Gurung ("the sponsor") who is a former Gurkha, discharged on 1 April 1995; they are the parents of the second appellant. On 27 September 2006 the sponsor was issued with a UK settlement visa which is still valid although he has never sought to use it to come to the United Kingdom or to settle here. On 6 September 2012 the appellants applied for entry clearance. Subsequent to that the sponsor took up a new three year contract with the Gurkha Reserve Unit based in Brunei, where he has lived since 2002; the first appellant had joined him there in 2008/2009. After being refused entry clearance to settle here, the second appellant applied for and was granted entry clearance to the United Kingdom as a Tier 4 (General) Student.

3. The respondent refused entry clearance to the first appellant on the grounds that:-

   (i) as the sponsor had been issued with a settlement visa outside the Immigration Rules, she could not meet the requirements of paragraph 276R of the Immigration Rules;

   (ii) he was not satisfied that the sponsor was present and settled in the United Kingdom or intends to enter the United Kingdom for the purpose of settlement with her and thus she did not meet the requirements of paragraph 276R(i);

   (iii) that as the first appellant did not meet the criteria of paragraph 276R(i) he was not satisfied that discretion should be exercised in her favour under the discretionary guidance for spouses of ex-Gurkhas; with regard to Article 8 of the Human Rights Convention, refusal of the application was justified and proportionate noting that refusal of the application would not interfere with family life.

4. The respondent refused the application of the second appellant on the grounds that:

   (i) As the second appellant's father was not present and settled in the United Kingdom or intends to enter the United Kingdom on the same occasion with him, refusal of the application was mandatory and he failed to fulfil the requirements of the Immigration Rules;

   (ii) The second appellant did not fall within the policy for dependants over the age of 18 of Foreign and Commonwealth and other HM Forces members, it not being clear what the necessary exceptional circumstances were;

   (iii) The second appellant was over 18 and thus he was not satisfied that Article 8(1) was engaged or that, even were that so, any interference caused by the refusal of entry clearance was proportionate.

5. In the grounds of appeal it was conceded that the appellants could not meet the requirements of the Immigration Rules but it was submitted that the decisions were contrary to the United Kingdom's obligations pursuant to Article 8; that this is an appeal in which the terms of the policy are clear and that there was a presumption in

favour of the appellant's being given entry clearance [27] and that there was nothing which on the facts of the case displaces such a presumption, it being further argued that no reasonable decision could refuse entry clearance whether by reference to existing policy or generally [28].

6. When the matter came before Judge Wright, the grounds of appeal were supplemented by a skeleton argument produced by Ms Lagunju who appeared for the appellants. The skeleton argument provides [2]:-

> "2. However as the sponsor was granted leave under the 'discretionary arrangements for former Gurkhas discharged before 1 July 1997' (see page 46 authorities' bundle) (the sponsor was discharged in 1995 please see sponsor's witness statement paragraph 2 respondent's bundle), the appellant should have been granted leave in line with her husband the sponsor. (See page 46 authorities' bundle in line with **R (Limbu) v SSHD [2008]** pages 54 to 82 authorities' bundle)".

7. I note in passing that it was also said in the skeleton argument that the sponsor made clear his intention to come to the United Kingdom as soon as the appellants are granted leave.

8. In his determination the judge found that:-

   (i) the second appellant could not succeed under the relevant policy [34];

   (ii) the first appellant's position fell to be considered under the relevant policy [36];

   (iii) no satisfactory explanation had been offered as to why the sponsor has not activated his visa since its issue in 2006 and it was not credible that he would not have used his visa had he had an intention to do so; and, his signing an additional three year contract working in Brunei casts even further doubt on his claimed intention to stay in the United Kingdom [39];

   (iv) there was no family life in the UK between the first appellant and the sponsor and the second appellant [40]; and, even were that so, the refusal of entry clearance did not amount to interference [41];

   (v) there was nothing to justify a conclusion that the respondent's decision under the policy was not in accordance with the law [44];

   (vi) even were he wrong with regard to interference, the refusal of entry clearance in respect of either appellant was proportionate [42], and even were there family life between the second appellant and his parents, given that he and his parents had lived apart for several years, that Article 8 was not engaged [54].

9. The appellants sought permission to appeal on the grounds that Judge Wright had erred:

(i) in failing to recognise or remedy the respondent's failure to correctly apply the policy and grant the first appellant's leave in line with the sponsor [3] and the suggestion that the policy did not apply because the sponsor had not activated was incorrect [5];

(ii) in restricting his findings on Article 8 as to whether family life exists in the United Kingdom, an incorrect basis on which to assess family life [7];

(iii) in failing to give proper reasons for finding that the refusal of entry clearance would be proportionate;

(iv) in failing to give adequate consideration to the second appellant's case is simply repeated verbatim at paragraphs 39 to 40 at paragraph 52 erring again in finding that the second appellant had not shown family life with the sponsor in the United Kingdom which is not the correct legal test; and

(v) in applying the wrong test when considering Article 8 family life when noting [54] that financial dependency is not emotional dependency or by failing to follow the decision of the Court of Appeal in **Ghising**.

10. The First-tier Tribunal Judge R A Cox granted permission to appeal on 19 December 2013 stating that it was arguable that the judge erred in the ways contended.

11. Mr Saldanha accepted that the grounds were not drafted by him and that he would be speaking solely to ground 1. Whilst he accepted that the use of the word "normally" was not an indication that the policy could never not be followed, he submitted that the issue had not been properly considered by the judge.

12. Mr Saldanha accepted that he was in some difficulty with respect to Article 8 given the jurisdictional issues arising from the fact that the sponsor was not present in the United Kingdom at any relevant time. He accepted also that the judge had made a finding of fact with regards to the sponsor's intentions.

13. Miss Holmes has submitted that the judge had reached a conclusion open to him with respect to whether the decisions were in accordance with the law or not, given the findings regarding the sponsor's intentions.

14. I turn first to the situation of the first appellant. The relevant policy – "Discretionary Arrangements for Former Gurkhas Discharged Before 1 July 1997" – appears in the respondent's bundle pages 46 to 47 to which I was helpfully directed by Mr Saldanha The relevant section provides:-

> "Discretion will normally be exercised and settlement granted in line with the main applicant for spouses, civil partners, unmarried and same sex partners and dependent children under the age of 18."

15. This is not a situation in which the Entry Clearance Officer failed to have regard to a relevant policy; it is a case where the respondent considered the policy and considered that it did not apply to the first appellant. Further, as this was not an

exercise of discretion within the Immigration Rules, it was not open to the judge to substitute his own decision of it, his role was to decide solely whether this decision was "in accordance with the law".

16. It was not properly put to Judge Wright in the skeleton argument or the grounds of appeal to the First-tier Tribunal that the respondent's decision was not one open to him having had regard to public law principles, that is a decision which was irrational, perverse or "**Wednesbury**" unreasonable; that argument is only now put substantively by Mr Saldanha.

17. Whilst it is averred in the grounds of appeal to the Upper Tribunal that the respondent took into account an irrelevant consideration in the exercise of discretion, and whilst it is arguable that that does (just) form a consideration outlined by the grounds of appeal and skeleton argument produced by Miss Lagungu, it was not argued in any detail before the judge.

18. It is not an error of law for a judge not to take into account or follow a submission which is not made to him. If, as is now contended, the respondent's decision was wrong on public law principles as Mr Saldanha submits, then that should have been put to the judge in those terms. Further, as Mr Saldanha conceded, the judge made a finding of fact that it was not the sponsor's intention to come to the United Kingdom which was one open to him. That was a conclusion also reached by the respondent and was, as I explain below, relevant to the exercise of discretion under the policy.

19. The purpose of the policy in question is clear; it was to facilitate the grants of entry clearance to Gurkhas discharged before 1 July 1997 and their families. The policy states that discretion will be exercised and settlement "granted in line" as the main applicant.

20. In this case there is a significant gap in time between the first occasion on which the sponsor obtained a grant of leave and the application by the appellants. It is accepted that he has never used it to settle in the United Kingdom, It cannot realistically be argued that the respondent was not entitled to conclude that the sponsor did not intend to become settled here or that it was perverse, irrational, or otherwise unlawful on public law principles to conclude therefore that the policy did not apply to the particular facts of this application.

21. Accordingly, I am satisfied that the judge did not err when he concluded that the respondent's decision was in accordance with the law, a conclusion with which he gave adequate reasons at paragraphs 44 of his determination, nor is it properly arguable that he could have come to any other conclusion. I am satisfied also that the finding that the second appellant did not fall within the terms of the policy was also open to the judge.

22. Turning to Article 8, I note that at the relevant date neither the appellants nor the sponsor were present in the United Kingdom. Indeed, the sponsor has never been settled here. This is a significant issue given that the scope of the European Convention on Human Rights is essentially territorial and it is only exceptionally

that rights can be asserted outside the jurisdiction or territory of the member state. As was stated in **Sun Myung Moon (Human rights, entry clearance, proportionality) USA [2005] UKIAT 00112** at [68]:

> "The essence of family life, which makes it possible that the ECHR extends to some non-nationals outside of the territorial jurisdiction who seek respect for their family life with someone settled here, is the need for physical proximity between those persons. This would cover the normal relationships between husband and wife, parent and child and closely allied relationships. We did not conclude that Article 8 in this extended form covered all aspects of personal and private life, or necessarily all those relationships which could come within the notion of family life within the Convention. It covers the basic components of family life, personal relationships which require physical proximity in order for them to be enjoyed in any real sense. We emphasise that in this extended form, we were examining the issue from the standpoint of the non-national out of country, rather than from the standpoint of the family member settled here. Our comments do not bear upon the position of the latter were they to assert rights as in **Abdulaziz**."

23. Whilst the issue of the extra-territoriality of the European Convention has been considered more recently in **Al-Skeini** [2006] UKHL 26 and by the Court of Appeal in **R v Naik** [2011] EWCA Civ 1546, I do not consider this alters the position that the Human Rights Convention is simply not engaged when what is asserted is a family life which exists outwith the United Kingdom and none of those between whom it exists are present here.

24. Further, even were it established that jurisdiction exists, as Mr Saldanha accepted, (and he did not speak to the grounds beyond ground 1), the grounds of appeal do not challenge the judge's finding that on the facts of this case there was no interference with the right to respect for family life given that all the parties were at the relevant time outside the United Kingdom and there was nothing to stop them from living together in Nepal or Brunei. That was a finding open to the judge and for which he gave adequate reasons. On that basis, it was open to him to conclude that the appellants' case that refusal of entry clearance was contrary to their rights pursuant to article 8 of the Human Rights Convention fell to be dismissed.

25. For these reasons, the decision of the judge did not involve the making of an error of law capable of affecting the outcome of the decision and I uphold it.

Signed Date: 13 February 2014

Upper Tribunal Judge Rintoul