Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 June 2014	**On 04th June 2014**

Before

UPPER TRIBUNAL JUDGE WARR

Between

ENTRY CLEARANCE OFFICER
(NEW DELHI)

Appellant

and

RUPESH GURUNG
(Anonymity Direction not made)

Respondent

Representation:

For the Appellant: Mr N Bramble
For the Respondent: Mr H Shoeb (Howe & Co)

DETERMINATION AND REASONS

1. This is the appeal of the Entry Clearance Officer but I will refer to the original appellant, a citizen of Nepal born on 12 July, 1989, as the appellant herein.

2. The appellant is the son of a former Gurkha soldier who applied for settlement in the United Kingdom. The Entry Clearance Officer refused the application on 3 January, 2013. The appellant appealed and his appeal came before First-tier Judge Tootell on 6 February, 2014.

3. The judge noted that the appellant's father had been granted status as a result of his 19 years of service with the Gurkhas and his mother who had also been granted settlement had returned to Nepal in order to await the outcome of the appeal. It was submitted that the appellant was not married nor leading an independent life and was entirely financially dependent on his father. Had the father been permitted to settle in the United Kingdom following his discharge from the British Army the appellant would have qualified for settlement as the minor child of his father.

4. The judge heard oral evidence from the appellant's father, the sponsor. He had initially applied for settlement in 2006 but this application had been refused. However he had appealed the decision and had been successful in 2009. His wife had subsequently applied successfully for settlement. He was still sending funds to the appellant who was a student and who wished to continue his studies in United Kingdom.

5. In giving her decision the judge noted that it was common ground that the appellant did not meet the requirements of appendix FM of the immigration rules. She accepted the submissions made on the appellant's behalf that there were compelling circumstances not recognised under the immigration rules which would justify a separate or additional analysis of the application under article 8, applying Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC). She reminded herself of the questions identified in Razgar v Secretary of State [2004] UKHL 27.

6. She found that Article 8(1) was engaged for the following reasons:

> 47. Having considered the evidence and the visa application form, the entry clearance record, the sponsor's witness statement and his oral evidence, I accept and find that the appellant was living with both of his parents in Nepal prior to his father's departure. I accept that the appellant's mother who was granted settlement after her husband, now divides her time between her husband in the UK and her son in Nepal.
>
> 48. I accept that the appellant is accommodated and financially maintained solely by his parents. I accept that he has not formed his own separate family unit or independent life. I accept that it is his and his parents perception that he still forms part of their family unit and that the common intention is that he should continue to live with them upon arrival in the UK.
>
> 49. The appellant has I find, been in full-time education up until now which has been fully sponsored by his parents. It is furthermore the

> common intention that he should continue his studies in the UK supported by his parents.
>
> 50. Finally, I find that there are close emotional ties between the sponsor, his wife and his son."

7. The judge found that the interference was in accordance with the law but having regard to the circumstances in which the Gurkha Army veterans found themselves the respondent's decision was neither necessary nor proportionate.

8. In paragraph 55 of the decision the judge stated as follows:

> "To the factors which have led me to the finding that the respondent's decision is disproportionate recited above, I add the following. It is part of the respondent's argument that the sponsor and his wife can relocate to Nepal either temporarily or on a permanent basis. I find however that this would involve the sponsor and his wife's potentially giving up their grant of settlement, thereby entirely frustrating the long delayed honouring of the Military Covenant and the redressing of the historic injustice to the sponsor."

9. The judge also took into account that the sponsor and his wife were now relatively elderly and "their ability to regularly travel between Nepal and the UK and adapt to changed circumstances in order to preserve family life, is more limited necessarily than in younger persons."

10. When all the factors were taken cumulatively the judge considered that the only country in which the appellant and his family members could meaningfully enjoy family life was in the United Kingdom. The consequences of the historic injustice outweighed the concerns about immigration control. The respondent's decision represented a disproportionate and unlawful interference in the appellant’s and his family member’s right to respect for their family light under Article 8. The appeal was accordingly allowed under Article 8, it not being suggested that the appeal could be allowed under the immigration rules.

11. The respondent applied for permission to appeal arguing that the immigration rules were a complete code, relying on MF (Nigeria) [2013] EWCA Civ 1192. Apart from Gulshan, reliance was placed on Nagre v Secretary of State [2013] EWHC 720 (Admin). Exceptional circumstances were circumstances where refusal would lead to an unjustifiably harsh outcome.

12. Inadequate reasons had been given for why the appellant circumstances were either exceptional or compelling. Relationships between adult siblings or adult children and their parents would not normally constitute family life unless there were special elements of dependency beyond normal emotional ties: Kugathas [2003] EWCA Civ 31. The appellant had lived apart from his parents in a different country

when his mother had left to join his father from July 2011 until February 2012. Financial remittances were insufficient to establish the requisite degree of dependency which had to be more than financial. The dependency was one of choice and not necessity. The appellant could support himself in Nepal having been educated to a high standard. The judge had had regard to immaterial matters. The appellant was aged 24 and could not meet the test in Kugathas. There was no evidence of any historical injustice in the absence of evidence that his father had intended to settle in the United Kingdom prior to the appellant turning 18 years of age.

13. Permission to appeal was granted by Designated Judge Coates on 23 April, 2014. A response was filed to the grant of permission by the appellant's representatives on 12 May, 2014. It was pointed out that this was not a deportation case unlike MF (Nigeria). The corrective principle identified in Gurung [2013] EWCA Civ 8 [2013] I WLR 2546 at paragraph 42 already took into account the public interest:

> "It follows that we do not accept the submission of Mr Drabble that the weight to be given to the historic injustice in the Gurkha cases is just as strong as the weight to be given to the injustice caused to the BOCs. The fact that the right to settle enjoyed by Gurkhas is less secure than that enjoyed by the BOCs is a relevant factor. But it also follows that we do not agree with the UT that the weight to be given is generally "substantially less" in the Gurkha cases. If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now. To that extent, the Gurkha and BOC cases are similar. That is why we cannot agree that, as a general rule, the weight accorded to the injustice should be substantially different in the two cases."

14. The judge's findings were consistent with the decision in Gulshan.

15. In relation to the issue of dependency reference was made to Ghising [2012] UKUT 00160, approved in Gurung at paragraphs 44-46, as well as RP (Zimbabwe) [2008] EWCA Civ 825 and AA v UK 8000/08 [2011] ECHR 1345. The appellant had not founded a family life of his own and continued to reside in the family home.

16. It had been argued there was no evidence that the appellant's father intended to settle in the United Kingdom prior to the appellant reaching the age of 18. In giving oral evidence the sponsor had made it clear that he had initially applied for settlement in 2006 and this application had been refused. He had successfully appealed in 2009.

17. A point was taken on the sponsor's military history but no submissions had been advanced as to how this would adversely affect the merits of the application.

18. At the hearing Mr Bramble relied on the grounds of appeal. Mr Shoeb referred to the response and submitted that the judge had not erred in law in finding that the appellant was dependent and this was a case where there had been an historic injustice as the sponsor had applied as early as 2006 under the policy. Mr Bramble made no response to the submissions or to the response that had been filed.

19. In my view the judge gave very careful attention to the issues in this case and directed herself correctly on the law. The findings of fact that she made were open to her.

20. As was noted in Gurung at paragraph 45 "whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case." I am not satisfied that the judge arguably misdirected herself in concluding as she did. The grounds go no further than expressing disagreement with the judge's findings which were fully and cogently reasoned.

21. In relation to the point made about the appellant suffering no injustice it is rightly pointed out that the sponsor initially made his application for settlement in 2006 when the appellant was still under 18. Accordingly the appellant can bring himself within the Gurung principle as set out in paragraph 42 which I have referred to above:

> "…If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now…."

22. I am not satisfied that the approach of the First-tier Judge conflicted with the jurisprudence that has built up concerning the new rules and indeed it was perfectly compatible with Gulshan.

23. The points made by the respondent in the grounds of appeal were not developed by Mr Bramble. In my view the arguments were rebutted by the response filed on behalf of the appellant and the grounds raise no error of law on the part of the First-tier Judge.

Signed

Upper Tribunal Judge Warr

4 June 2014