Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/11826/2013

THE IMMIGRATION ACTS

Judgment delivered orally at hearing
Heard at Field House **Determination Promulgated**
On 13th March 2014 **On 3rd April 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BIR BAHADUR TAMANG

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr H Shoeb, Solicitor, Howe & Co Solicitors

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State but for convenience I refer to the parties as they were before the First-tier Tribunal.

2. On 17th January 2013 the appellant, a citizen of Nepal born on 6 October 1988, applied for entry clearance to join his family in the UK for the purposes of settlement. That application was refused in a decision dated 7th May 2013. It was said in the decision notice that the appellant was not able to meet the requirements of the Immigration Rules and in fact so much is accepted on behalf of the appellant. What those requirements are I do not need to elaborate in this decision.

3. The appeal came before First-tier Judge Lobo at a hearing on 20th December 2013. In a decision promulgated on 16th January 2014, Judge Lobo allowed the appeal on human rights grounds. He allowed it on human rights grounds because he was aware of the fact that the appellant could not succeed under the Immigration Rules and the Immigration Rules in relation to family life were not argued before him.

4. The judge heard evidence from the appellant's mother, Mrs S M Tamang, and she was the only witness who was called to give evidence. Amongst the evidence that she gave was that if the present law in relation to the settlement of Gurkhas and families had existed before her husband's death, and he died in 2008, and after his retirement, her husband would have applied to enter the United Kingdom with herself and their three children including the appellant.

5. She also gave evidence that of her three children only the appellant remained in Nepal. He did not apply for entry at the same time as the sponsor, that is his mother who is the witness, and her children because she had placed him in a drug rehabilitation unit for his addiction to drugs. Her evidence was also that the appellant is financially dependent on her and that she sends money regularly to Nepal where he lives in his mother's house. Her evidence was that he is emotionally dependent on her and his siblings as a consequence of his father spending much time away on military service.

6. The early death of his father also led to drug abuse and her evidence was that she earned sufficient income to allow her to maintain and support her family in the UK, to send money to the appellant and to provide for accommodation for him and the other children.

7. At para 28, the judge made certain findings of fact. They go from sub-para (a) to sub-para (p). It is not necessary in this judgment to refer to all the findings made by the judge but he concluded that the appellant's father was a Gurkha serving in the British Army who died in 2008. He concluded at 28(d) that had the appellant's father survived he would have applied for settlement with his wife and three children, including the appellant, and at sub-para (e), but for the denial of the opportunity to apply, the appellant's father would qualify for settlement at the time of his discharge. He went on to find that the appellant himself would therefore have qualified for settlement under certain paragraphs of the Immigration Rules.

8. He accepted the evidence of the appellant's mother that she had put him in a drug rehabilitation unit to help him overcome substance misuse and that he is no longer dependent on drugs according to his mother, who the judge found at sub-para (j) to

be a credible witness. At sub-para (l) it was found that the appellant is financially dependent on his mother who sends various amounts on a regular basis The judge referred to money transfers receipts produced at the hearing to the tune of about £6,450 covering a period of "1 December 2012 to 19 October 2012", although those dates as written do not appear to be correct, and the money transfer receipts on the Tribunal file cover a period from about May to December 2013. However, nothing turns on this it seems to me.

9. At sub-para (m) the judge found that although the appellant is 25 years of age and in good health, he is reliant on his mother and siblings for a number of reasons and he gave those reasons as follows. His reliance is a consequence of his own personality. Secondly, the fact that as a family they all became reliant upon each other when their father was away on active service. He found that Gurkhas serve or served under more restrictive terms of service which allowed less time with their families.

10. Then he found that the appellant's drug addiction and the help of his mother and family helped him to overcome the problem and he also found that his younger sister looks after him in Nepal even though she has leave to settle in the UK. He, at least implicitly, made findings about the ability of the appellant's mother to maintain and accommodate the appellant.

11. It is said in the grounds of appeal to the Upper Tribunal that there was insufficient basis for the judge to have concluded that the appellant's father intended to apply for settlement prior to his death in 2008.

12. That proposition is not correct, given the findings of the First-tier judge that I have already referred to. There was evidence from the appellant's mother that such an application for settlement would have been made had the father had the opportunity to do so and that application would have included the appellant. As I have already indicated, the judge found the evidence of the appellant's mother to be credible.

13. The judge went on to find that there was family life between the appellant and his family in the UK. At para 32(c), he said that the appellant continues to reside in the family home and has not yet established an independent life, at sub-para (d) that he is financially dependent on the sponsor, and at (e) that he, his mother and siblings are a close family unit.

14. He referred to cultural factors to be taken into account and concluded that the prolonged separation due to service and economic necessity further strengthened the present bond, and he went on to conclude therefore that there was family life established.

15. The grounds of appeal challenge the judge's conclusions that there is established family life. In further submissions before me, Mr Nath relied on the decision in AAO [2011] EWCA Civ 840 to the effect that financial dependence would not be sufficient to establish family life. However, the judge did not conclude that there was only financial dependence. As I have already indicated with reference to the

determination, there are a number of factors that the judge took into account in finding that family life does exist.

16. It is said that the judge did not take into account relevant authority. One of the cases cited in support of that proposition is Gulshan (Article 8-new rules-correct approach) Pakistan [2013] UKUT 640 (IAC). Mr Nath took me to various passages of that decision, suggesting that the judge did not adopt the correct approach in the assessment of Article 8 with reference to the new Rules.

17. It is true to say that the judge did not refer to every relevant authority that could possibly be cited in the appeal, although in the case of Gulshan, it was only promulgated three days before the hearing of this appeal in the First-tier Tribunal. Nagre [2013] EWHC 720 (Admin) is also of potential relevance, although it being a decision of the Administrative Court it has taken time for its significance to be understood.

18. However, the First-tier judge did have regard to a wide range of authority. Contrary to what is suggested in the grounds, I am satisfied that he did take into account the relevance of the Immigration Rules in the assessment of proportionality. He referred to the need for a two stage test, having a separate sub-para in that regard, starting at para 16, and referred to the decision in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC) and the Court of Appeal decision in the same case (MF [2013] EWCA Civ 1192).

19. At para 30 of the determination he referred to the Article 8 assessment requiring a two stage process, and that the Article 8 claim must be considered against the requirements of the Immigration Rules, stating that in the context of this appeal that means Annex FM. He went on to state that "If the appellant fails to meet those requirements then the claim must be considered against the ECHR". At para 31 he said that it was common ground that the appellant does not meet the requirements of the Immigration Rules and therefore he had to move on to consider the ECHR.

20. It is true that under the sub-heading "Is the Interference Proportionate?" the judge did not go on again to refer to the decisions in MF, but I am satisfied that he had sufficiently in mind the public interest as reflected in the Immigration Rules. This is evident when one reads the determination as a whole. It seems to me to be crucial that the judge concluded that, but for the historic injustice, the appellant would have had an application for settlement made on his behalf by his father. As I say, that was a conclusive finding by the First-tier Tribunal.

21. This is relevant particularly because of two decisions: one of the Court of Appeal in Gurung [2013] EWCA Civ 8 and secondly a decision of the Upper Tribunal in Ghising and others (Ghurkhas/BOC's: historic wrong; weight) [2013] UKUT 567 (IAC).

22. In the latter decision, the Upper Tribunal said at para 59 that they accepted the submission that where Article 8 is held to be engaged and the fact that but for the historic wrong the appellant would have been settled in the UK long ago is

established, "this will ordinarily determine the outcome of the proportionality assessment; and determine it in an Appellant's favour".

23. The Upper Tribunal went on to say (para 60) that being an adult child of a UK settled Gurkha ex-serviceman is not a trump card in the sense that not every application by such a person will inevitably succeed; but if the respondent is relying upon the public interest as described by the Court of Appeal at para 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the appellant's favour.

24. In this appeal, there was, and is, nothing to indicate that the respondent relies on anything other than the interests of immigration control on the public interest side of the proportionality balancing exercise. Sometimes there may be other matters relied on, for example criminality, or a bad immigration history, that may militate against the proportionality assessment in favour of the appellant. As I say however, no such matters are relied on in this case.

25. When one sees the determination in its proper context, considering it as a whole, I am satisfied that the judge came to his conclusions in accordance with relevant authority and undertook a satisfactory proportionality assessment, taking into account all relevant facts. Whilst the judge could have, under the sub-heading of proportionality, repeated all the matters that he had previously made findings about, looking at the determination as a coherent whole I am not satisfied that that would have been a necessary step for him to take, particularly when he had concluded, crucially, that an application for settlement would have been made earlier by the appellant's father.

26. In these circumstances, I am not satisfied that there is any error of law in the First-tier Judge's decision and therefore the decision to allow the appeal under Article 8 of the ECHR is to stand.

Upper Tribunal Judge Kopieczek 28/03/14