Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14268/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13 November 2014

Determination Promulgated
On 28 November 2014

Before

Deputy Upper Tribunal Judge Pickup

Between

Dharmindra Rana
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer

Respondent

Representation:
For the appellant: Ms A Jaja, instructed by Howe & Co Solicitors
For the respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Dharmindra Rana, date of birth 1.3.88, is a citizen of Nepal.

2. This is his appeal against the determination of First-tier Tribunal Judge Hussain, who dismissed his appeal against the decision of the respondent, dated 18.6.13, to refuse him entry clearance to the United

© CROWN COPYRIGHT 2014

Kingdom as the dependant son of Mr Gajbir Rana. The Judge heard the appeal on 20.5.14.

3. First-tier Tribunal Judge Pooler granted permission to appeal on 29.8.14.

4. Thus the matter came before me on 10.10.14 as an appeal in the Upper Tribunal.

5. I found such errors of law in the decision of the First-tier Tribunal that I set it aside and adjourned the remaking of the decision to a continuation hearing before me in the Upper Tribunal.

6. Thus the matter came back before me on 13.11.14 as a continuation/resumed hearing in the Upper Tribunal. The sole issue, as it was before the First-tier Tribunal is family life under article 8 ECHR. I have to determine whether there was family life between the appellant and the rest of his family at the date of refusal and whether, applying the Razgar five step approach the decision to refuse was proportionate. The burden is on the appellant to demonstrate that the interference with family life occasioned by the refusal decision is sufficiently grave as to engage article 8. If so, the burden is on the respondent to demonstrate that the decision was proportionate.

7. The crucial issue in relation to proportionality is the balancing exercise between on the one hand the rights to respect for family life of the appellant and his family in the UK and on the other the legitimate and necessary aim of the state to protect the economic well-being of the UK though immigration control. It is clear that the appellant cannot meet any of the Immigration Rules for entry to the UK. In the circumstances of their being no complete code for article 8 considerations within the relevant Immigration Rules, I consider it appropriate to make an article 8 assessment, whether or not there are any compelling circumstances insufficiently recognised in the Immigration Rules so as to justify, exceptionally, allowing the appeal under article 8 family life on the basis that the decision is unjustifiably harsh.

8. Although the case law continues to develop, the current position is perhaps best expressed in paragraph 135 of R(MM (Lebanon)) v SSHD [2014] EWCA Civ 985:

> "135. Where the relevant group of IRs [immigration rules], upon their proper construction provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although reference to "exceptional circumstances" in the code will nonetheless

> entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law."

9. I should also recall that the threshold to engage article 8(1) is not particularly high (see VW (Uganda) v SSHD [2009] EWCA Civ 5).

10. In conducting any proportionality balancing exercise under article 8 I have to have regard to the effect of the historic injustice, which interest, if it can be shown that but for the historical injustice the ex-Ghurkha would have settled in the UK at a time when the child could have joined him, has been held to be likely to outweigh the public.

11. The evidence of the appellant's father at §14 of his witness statement was that he would have settled in the UK on discharge from the army, could he have done so at that time. The appellant was born in 1988, 4 years after his father's discharge and thus would have been born in the UK, had his father been permitted to settle on discharge. In oral evidence before me he explained that the appellant had never lived apart from the family before they left Nepal. The questioning of Mr Rana investigated the two different addresses given in the documentation. However, I accept that the family had a village home in Tribini, but moved to Pokhara in 2008, where they rented a home, to enable the children to be educated locally. He explained that their permanent address was in their remote village but their temporary address was in Pokhara. When the family came to the UK in 2010 they left the appellant behind in the same address and where he has shared the cost of living with a number of fellow students. Mr Rana also explained that when they came to the UK they did not have enough money for the appellant to come, so decided to come to the UK and earn the money necessary whilst enabling him to continue his education in Nepal. As he was then already over 18, he was advised that an application would be refused and he would thus lose the fees paid. I find the explanation reasonable and credible, especially when any delay in coming to the UK would have jeopardised the right of the younger son to come to the UK and thus made things more difficult for the family.

12. The appellant's mother and brother also gave evidence. They explained that they were sad that the appellant has not been able to join them in the UK. His father is sending him money every month. The appellant's brother said that the appellant wanted to pursue higher education and get a better job, but he had no employment at the present time.

13. As Mr Avery submitted, the key issue in this appeal is whether there is family life between the appellant and the rest of the family in the UK. Whilst they chose to leave him behind, I accept on the evidence that they could not afford to apply to bring him and had been advised that such

an application would be refused. If they had delayed much longer than 2010, the appellant's younger brother would have reached the age of 18, making it difficult for him to accompany the parents to the UK. He turned 18 in 2010, thus there was no time to lose. It must have been a difficult decision for the family but they did what they thought best at the time, based on the advice they had received. That also appears consistent with the refusal decision which spelt out that adult children would only be granted leave in exceptional circumstances.

14. I also find on the evidence that it was always the intention of the family for the appellant to join them in the UK, just as soon as they could afford the costs of an application to do so. I find that the appellant has not established an independent life apart from his family or that he should be penalised for having to be left behind in Nepal. The respondent has not sought to challenge the fact that the appellant remains financially dependent on his parents.

15. Whilst there has been a voluntary, on the part of the parents, separation from the appellant, this does not necessarily break the family ties and on the facts of this case it is clear that the appellant retains close links both emotionally and financially with his family in the UK. They speak regularly and more significantly they have been back to visit him in Nepal. In essence, little has changed between the time when the appellant was under 18 and now; I find that he remains a member of the family and has not yet established a life of his own independent of the family, being still in education and still living in the family home.

16. I also find on the oral and written evidence of the father that had he been able, he would have applied for settlement in the UK on his discharge from the army and this would mean that all of the children would have been entitled to residence in the UK.

17. I have considered the case law in the appellant's authorities bundle and in particular Ghising and others (Ghurkhas/BOCs; historic wrong; weight) [2013] UKUT 00567 (IAC), and Pun and others (Gurkhas – policy – article 8) Nepal, where it was held that financial dependency of choice so that the child can pursue further studies does not mean that such dependency cannot properly be taken into account. In Kugathas, it was made clear that it is not essential that members of the family be in the same country for family life to be capable of existence.

18. In UG (Nepal) & Ors v Entry Clearance Officer [2012] EWCA Civ 58, it was submitted on behalf of the Secretary of State that the purpose of the policy was to recognise military service and avoid the phenomenon of the 'stranded sibling,' whose parents and younger siblings have all gone to the UK, leaving him alone in his own country. The Tribunal is entitled to consider the purpose of the policy.

19. At §25 of Pun, the Upper Tribunal agreed that article 8 cannot be used as a device to exercise a discretion outside the Rules which otherwise would not be open to the Tribunal, "but where an assessment is being made of whether a decision is in breach of article 8, it would be artificial to leave out of account any relevant policy particularly when assessing proportionality."

20. In Ghising it was held by the Upper Tribunal that:

> (1) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.
>
> (2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).
>
> (3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.
>
> (4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.
>
> (5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour may still be sufficient to outweigh the powerful factors bearing on the Appellant's side of the balance.

21. I should add that I have taken into account all those factors set out in section 117B of the 2002 Act and in particular that the maintenance of immigration control is in the public interest.

22. In all the circumstances, I do give substantial weight to the historical injustice in the proportionality assessment. Taking all the factors mentioned above into account, in the round, as a whole, I find that the proportionality balance in this case comes clearly down in the appellant's favour. It would be unfair and unjustifiably harsh to prevent this appellant from joining his family in the UK. I have found that was the intention from the outset and that the appellant's circumstances in Nepal are not such to have broken the family bond. There is family life even though they have been apart for some time and taking due account of both the public interest and the historical injustice and the purpose of the policy, the Secretary of State has failed to demonstrate that the decision was proportionate on the facts of this case.

Conclusion & Decision:

23. For the reasons set out herein, I find that there is continuing family life between the appellant and his family in the UK, the interference with which is sufficiently grave to engage article 8 ECHR. Applying the Razgar tests I also find for the reasons stated that the decision of the Secretary of State was disproportionate.

The appeal is allowed on human rights grounds.

Signed: Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a full fee award.

Reasons: The appeal has been allowed.

Signed: Date: 27 November 2014

Deputy Upper Tribunal Judge Pickup