



**UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)  
OA/16804/2013**

**APPEAL NUMBER:**

**THE IMMIGRATION ACTS**

**Heard at: Field House**

**Determination  
Promulgated**

**On: 16 September 2014**

**On: 19 September 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**MR SUMAN YUNG SHAHI  
NO ANONYMITY DIRECTION MADE**

**Appellant**

**and**

**ENTRY CLEARANCE OFFICER:**

**Respondent**

**Representation**

**For the Appellant: Mr A Shoeb, Solicitor (Howe and Co)**

**For the Respondent: Mr S Walker, Senior Home Office Presenting  
Officer**

**DETERMINATION AND REASONS**

1. The appellant is a national of Nepal born on 1<sup>st</sup> July 1987. His appeal against the decision of the respondent refusing his application for entry clearance to the UK as an adult dependant relative of a person present and settled in the UK was refused by First-tier Tribunal Judge Traynor in a determination promulgated on 1<sup>st</sup> July 2014. He dismissed the appeal under the Immigration Rules as well as pursuant to Article 8 of the Human Rights Convention.

2. The appellant had contended that the appeal should be allowed under Article 8. The Judge found that information placed before the respondent in the present application was no different to the earlier application, considered and refused in 2010. That had been dismissed on appeal in 2011. The appellant had not advanced any reason which would suggest that his circumstances had changed, or were in any way different to the earlier application.
3. The Judge referred to **Gulshan v SSHD [2013] UKUT 00640 (IAC)** and found that there were no arguably good grounds advanced by the appellant which would lead him to the conclusion that it would be unreasonable not to consider his free standing Article 8 rights. The respondent had carefully considered the appellant's circumstances. The appellant's application did not meet the requirements. There were no arguably good grounds advanced by the appellant which would "show that such consideration has in any way been effective." Accordingly, the appellant was not entitled to have his circumstances considered outside the rules.
4. In referring to **Gulshan**, the Judge stated at paragraph 48 that it is only where there are arguably good grounds that a person's Article 8 rights should be considered outside the rules. He went on to state that essentially the test is whether or not it is reasonable for such rights to be considered in circumstances where the respondent may not have had all the relevant information before him/her when the decision was made. The circumstances in the appellant's witness statement and the oral testimony of his father show that the circumstances were exactly the same in the present application.
5. The Judge found that there was no family life between the appellant's son and either of his elderly parents. The Judge considered in detail whether or not there was any financial dependency by the son on his father (52-56). Although the appellant may speak to his father about once a week, there is no evidence that he is able to speak to his mother as she is profoundly deaf. There is essentially no communication between them other than what is conveyed to her through his father. Based on the above conclusions, the Judge found that there is no financial dependency which the appellant or sponsor had proved which would suggest that the appellant is reliant upon his family in order to subsist [56].
6. With regard to proportionality, the Judge found that even if there were family life, any interference would be proportionate. He agreed with the respondent's submission that the burden of proof is upon the appellant, through his father, to prove that he would have settled in the UK following his discharge from the Brigade of Gurkhas in 1969 [58].

7. The Judge found that because the sponsor had never applied to come to the UK before, he must conclude on the balance of probabilities that he had never formed any intention to come to the UK prior to the recent changes in the law.
8. At the hearing before me, Mr Shoeb submitted that the Judge erred in law. Firstly, there is nothing from **Gulshan** which says that the test to consider whether to apply Article 8 is whether there is now something new not before the Entry Clearance Officer. The Judge stated that the very essence of the test was to ask whether the respondent had all the relevant information before him when the decision was made.
9. He submitted that this is plainly wrong. **Gulshan** has nothing to do with asking whether there is any fresh material before the Tribunal. The effect of **Gulshan** as set out at paragraph 27 of the decision is that only if there were arguably good grounds for granting leave to remain outside the rules is it necessary for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the rules.
10. Mr Shoeb submitted that there were such good grounds and that there were accordingly compelling circumstances not sufficiently recognised under the rules.
11. The case involved an adult dependant relative of a Gurkha veteran. The good grounds for granting leave to remain outside the rules is demonstrated by the fact that the Secretary of State had a policy in place for granting leave outside the rules in such circumstances. There were self evidently compelling circumstances not sufficiently recognised by the rules, because the rules as they applied to Gurkhas and their families had been found to be fundamentally unfair. Accordingly, this is a case where it is appropriate and necessary to consider Article 8. The rules did not cater for every eventuality.
12. Moreover, there can be little confidence that in asking himself the wrong question at the outset, that this did not affect the entire analysis by the Judge of the appellant's alternative case.
13. Mr Shoeb also submitted that the Judge's reasoning in that there was no family life was defective. The Judge did not take into account relevant factors. He concentrated excessively, if not exclusively, on financial dependency. He failed to take into account the potentially more than normal emotional ties.
14. He also misdirected himself regarding the mother. It did not follow from the fact that she is profoundly deaf that the appellant could not enjoy a family life with her. The Judge noted that communication was through

the father. However, he did not have any proper regard to this when determining whether this might mean that there are more than normal emotional ties between the son and his profoundly deaf mother.

15. The reality is that as a profoundly deaf mother, it is all the more likely that there exists a particularly acute bond between the mother and son. She is all the more likely to miss her son intensely given that she cannot otherwise communicate with him at all. The Judge accordingly failed to engage properly with the impact of the mother's deafness on the relationship between them.
16. Insofar as proportionality is concerned, the Judge found that even if there were family life, any interference would be proportionate.
17. Mr Shoeb submitted that the burden was on the appellant to establish that there is family life. If there is, the burden shifts to the respondent to establish the proportionality of the interference.
18. The Judge however completely ignored the 'categorical' evidence of the sponsor, both in written and oral evidence that if he had been able to apply to come to the UK at the date of his discharge, he would have done so. The Judge concluded that because the sponsor had never applied to come before, he had never formed an intention to come here prior to the recent changes in the law. That was a misdirection as there was no way that the sponsor could have applied to come to the UK prior to the change in the law. The Judge's finding would be to undermine the very basis of the "historic injustice" principle to say that the fact that someone failed to apply for something they were not entitled to weighs against them.
19. On the contrary, the evidence was that the sponsor relocated to Saudi Arabia on discharge. That underscores his evidence that if he could have come to the UK then he would have. If he went to Saudi Arabia, a country with which he had no connection, it is all the more likely that he would have come to the UK if he could have, given the connection of the Gurkha regiment.
20. Mr Shoeb relied on the European authority of **AA v UK [2011] ECHR 8000/08** and in particular paragraphs 47-49. There, the court held that an examination of its case law would tend to suggest that the applicant, a young adult of 24, who resided with his mother and has not yet founded a family of his own, can be regarded as having "family life." It was not necessary to decide that question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world, it can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they

are living constitutes part of the concept of “private life” within the meaning of Article 8. Therefore, regardless of the existence or otherwise of a “family life” the expulsion of a settled migrant constitutes an interference with the right to respect for private life.

21. At the outset of his submissions, Mr Walker on behalf of the respondent initially sought to uphold the determination on the basis that the Judge had made a full analysis of the situation of the appellant and his parents. He had concluded that the appellant was not a dependant of his father in the UK, and found that he was working and maintaining himself and his sisters.
22. Eventually, however, Mr Walker stated that on reflection and having regard to the reasons relied on by the appellant in the grounds before the Upper Tribunal, the decision did involve the making of material errors of law.
23. In the circumstances, both parties submitted that the decision should accordingly be set aside. Mr Shoeb submitted that this was an appropriate case to be remitted to the First-tier Tribunal having regard to the fact that the appellant had not had the opportunity of having his case properly considered by the First-tier Tribunal. Moreover there would have to be a complete re-hearing.
24. Mr Walker did not oppose that application but remained neutral.

### **Assessment**

25. I have had regard to the grounds of appeal raised by the appellant, and in particular the misapplication of **Gulshan**. I accept that this error has the potential of affecting the analysis of the appellant's alternative submissions, and in particular with regard to the finding that there was no family life.
26. In the approach to family life with an adult family member, the Judge had regard to the decision in **Kugathas [2003] EWCA Civ 31**. He stated that in order to be satisfied whether family life subsists between the appellant and his parents, he had to determine whether that relationship goes beyond the normal emotional ties of family life. It does not appear that the submission made by the appellant's counsel that he should view family life in the round, having regard to cultural circumstances applicable regarding the reliance of adult children upon parents in Nepal, was a factor establishing strong emotional ties sufficient to amount to family life.
27. Finally, for the reasons given in the grounds of appeal, I find that the Judge's finding that any interference with family life would be

proportionate was affected by his failure to have regard to the evidence of the sponsor both in his written and oral evidence that had he been able to apply to come to the UK on discharge, he would have done so.

28. In the circumstances, as agreed by the parties, I set aside the decision. I accept the submission that there will have to be a complete re-hearing.
29. I also consider that it is appropriate for the appeal to be remitted to the First-tier Tribunal. I have had regard to the Senior President's Practice Statement in this regard. I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be remade is such that having regard to the overriding objective in Rule 2, it is appropriate to remit the case.
30. I have also had regard to the fact that the errors referred to resulted in the appellant's case not being properly considered by the First-tier Tribunal. I also find that the issues are not complex, requiring any special expertise of the Upper Tribunal. There will have to be a complete re-hearing in the circumstances.
31. Instructions to the administration for remitted cases have been prepared. The agreed hearing date is 29<sup>th</sup> January 2015 at Taylor House.

Signed

Date 16 September 2014

C R Mailer  
Deputy Upper Tribunal Judge