Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08787/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th April 2019	**On 9th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

POONAM SHRESTHA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr J Khalid, Counsel instructed by Goulds Green Chambers

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer (New Delhi) against the decision of Judge Plumptre, promulgated on 13th February 2019, to allow the appellant's appeal against refusal of her application for entry clearance as the adult dependent daughter of an ex-member of the Brigade of Gurkhas who has indefinite leave to remain in the United Kingdom.

2. As with all human rights appeals brought against a decision made on or after the 5th April 2015, the sole ground upon which the appellant was able to appeal the decision to refuse of her application for entry clearance was

that it was unlawful under Section 6 of the Human Rights Act 1998 as being incompatible with her right to respect for private and family life under Article 8 of the Human Rights Convention. The resolution of this appeal therefore called for an analysis based upon the structured approach suggested by Lord Bingham of Cornhill in the case of **Razgar [2004] UKHL 27**. It will be recalled that this entails addressing the following five questions:-

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

3. I pause briefly to observe that the questions are all posed on the assumption that the appellant is already in the United Kingdom and that the issue for determination is whether it would breach a person's rights under Article 8 for them to be removed. It is therefore necessary to adapt those questions to allow for the fact that this is an entry clearance case.

4. If the stage is reached of addressing the fifth question, the historic injustice arising from the inability of a former member of the Brigade of Ghurkhas to settle in the United Kingdom is likely to weigh heavily in favour of an adult family member of such a person in assessing the proportionality of excluding that person from settlement in the United Kingdom.

5. However, before that stage is reached, it remains necessary for the claimant to establish the existence of family life with the former member of the Brigade of Ghurkhas whose right of settlement in the United Kingdom has thus belatedly been recognised. There are in this regard no special rules for the children of Gurkhas (see **Pun & Anor (Nepal) v The Secretary of State for the Home Department [2017] EWCA Civ 2106**).

6. There is no single test for the existence of family life. However, it is generally accepted that the relevant jurisprudence is fairly and accurately summarised in Government policy relating to the admission of adult children of Gurkhas discharged from service before 1st July 1997. Under that policy the relevant requirements are as follows:

- the applicant is financially and emotionally dependent on the former Gurkha;
- the applicant has not been living apart from the former Gurkha for more than two years on the date of application and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the applicant lived away);
- the applicant has not formed an independent family unit.

7. The first stage of the **Razgar** analysis thus requires the decisionmaker to decide whether family life exists as between the applicant and the member of the Brigade of Gurkha who was discharged prior to the 1st July 1997. The policy provides further guidance in this regard as follows:

> "**Living apart**
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> The applicant must not normally have lived apart from the Gurkha sponsor for more than 2 years. An exception to this requirement may be made when the family unit was maintained, albeit the applicant lived away from the Gurkha. For example, when the applicant is living with the Gurkha's spouse who is living apart from the Gurkha or where time was spent at boarding school, college or university as part of their full-time education where the applicant lived at university or college during term time … but resided in the family home during holidays. If these conditions are not met and an exception does not apply, the application should normally be refused on this basis.
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> **Living independently**
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> The application should be refused if the:
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> - applicant is living independently in a different family unit (for example, the applicant is living with relatives who are acting in a parental capacity)
> - applicant has formed their own independent family unit by getting married or entering into a civil partnership or a relationship akin to marriage or civil partnership".

8. With the above principles in mind, I now turn to consider the grounds of appeal against the decision of the First-tier Tribunal.

9. There was an issue before the First-tier Tribunal as to whether the appellant had made a false statement in an application for entry clearance and thus failed to meet the suitability requirements for admission to the United Kingdom. Judge Plumtre exonerated the appellant in this regard and that finding is not subject to criticism in this appeal. It thus remained for the Tribunal to resolve the issues that I have set out above.

10. On the face of it, the appellant failed to meet the requirement that she had not formed an independent family unit. This was because she accepted that she had at one time been married and that for the duration

of her marriage she had been living with her husband and apart from her father. It was the appellant's case, however, that the marriage had lasted only a matter of months and that she had thus never ceased to be emotionally and financially dependent upon her father. Put another way, she claimed that her marriage and brief cohabitation with her husband had not interrupted the family life that she had enjoyed with her father from childhood to the present day.

11. The judge considered this issue at paragraphs 34 to 43, wherein she noted various significant inconsistencies in the evidence concerning the date of the appellant's marriage and subsequent separation. She also noted severak consequential anomalies in the evidence concerning the duration of the appellant's cohabitation with her former husband. The judge did not however seek to resolve those discrepancies and anomalies. By way of example, the judge on several occasions stated that she had attached weight to documents that gave entirely contradictory information concerning the time when the appellant had married and when she had separated from her husband. The judge also stated that she had taken account of the fact that the appellant had in a previous appeal given evidence as to when and for how long she had been married that was wholly at odds with the evidence upon which she was relying in the present proceedings -

> "I give weight to the fact that the dates of marriage and separation are clearly different in both of these documents and that both documents are inconsistent with the earlier witness statement provided by the appellant for the hearing before Judge N M K Lawrence …" [paragraph 40]

The judge went on to find (at paragraph 43) that the dates that the appellant had given for her marriage in an earlier witness statement could not be correct given that there was documentary evidence that contradicted it. What the judge did not do, however, was to make any findings concerning the timing and duration of the appellant's marriage. Such a finding was highly material to the question of whether the appellant continued to enjoy family life with her father, given that appellant's marriage and cohabitation with her then husband was likely to a very strong (if not determinative) factor in the overall assessment of whether the appellant continued, as an adult dependent relative, to enjoy family life with her father. The failure to make clear findings of fact in this regard was thus a material error of law. I am therefore satisfied that the first ground of appeal is made out.

12. The second ground of appeal is that the Tribunal failed to make any findings concerning whether the appellant was financially dependent upon her father. The relevance of such a finding was of course that it potentially supported the appellant's claim that she retained family ties with her father that were over and above the emotional ties that usually exist between two adults who are thus biologically related.

13. It is right, as Mr Khalid pointed out, that the judge recited the evidence of the appellant's father (at paragraph 25) which was to the effect that his daughter was neither working nor studying and that he was supporting her financially. It was of course open to the judge to have accepted that evidence. However, she appears to have forgotten about it by the time she came to make her findings in this regard. Thus, at paragraph 56, she said this:

> "Although the Upper Tribunal appears to have been exercised about Judge N M K Lawrence's decision or lack of it regarding dependency, I comment that no evidence was given about this issue before me and few if any submissions made about it. In particular there was no reference by the advocates to any objective evidence that dependency of adult children is peculiar to Nepal. I add that many 30 year old children in London live with their parents." [Emphasis added]

By way of an aside, I agree with Mr Whitwell that the relevance of the fact that many 30-year-old children in London live with their parents (if it be a fact) is obscure. Be that as it may, having noted that the Upper Tribunal had overturned a previous decision to allow this appeal on the basis that the First-tier Tribunal had failed to make a finding concerning the appellant's financial dependency upon her father, the judge proceeded to make precisely the same mistake upon the apparently erroneous basis that no evidence had been adduced before her concerning this issue. I have already noted that the failure to make a finding concerning the timing and length of the appellant's marriage was highly material to the first question in **Razgar**. It seems to me that the failure to make a finding concerning the issue of financial dependency was material to the outcome of the appeal for the precisely the same reason. Without such findings, it was not possible to say whether the appellant could overcome the first hurdle in the **Razgar** analysis (establishing the existence of family life) prior to considering the issue of proportionality. It follows that this appeal must be allowed on both grounds and the decision of the First-tier Tribunal must be set aside.

14. I heard representations from both Mr Whitwell and Mr Khalid as to how this appeal should now proceed. Whilst Mr Whitwell remained neutral, I think it would be fair to say that Mr Khalid inclined towards the appeal being heard afresh in the First-tier Tribunal. Save for the matter mentioned in paragraph 9 (above) this is not a case in which I have preserved or set aside particular findings of fact. Rather, it is a case in which the First-tier Tribunal has yet to make any findings at all concerning matters that are critical to the outcome of the appeal. It is therefore only right and proper that the First-tier Tribunal should now make those findings. I have thus reluctantly concluded that I should remit this appeal to be heard before any judge other than Judge N M K Lawrence or Judge Plumptre. Given that this will be the third occasion on which the First-tier Tribunal has been called upon to make essential findings of fact (the nature of which I hope will be clear from this decision) I would urge the Resident Judge at Hatton Cross to consider whether the further hearing of this appeal should be expedited.

Notice of Decision

1. The appeal of the Entry Clearance Officer is allowed and the decision of the First-tier Tribunal is set aside.
2. The only finding of the First-tier Tribunal that is preserved is that referred to at paragraph 9 (above).
3. The appeal is otherwise remitted to be heard afresh by any judge other than Judge N K M Lawrence or Judge Plumtre.

No anonymity direction is made.

Signed

Date: 5th May 2019

Deputy Upper Tribunal Judge Kelly