Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15506/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th November 2019	**On 13th December 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR DURGA PRASAD THEBE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr D Balroop of Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms R Bassi, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant seeks permission to appeal the determination of First-tier Tribunal Judge Louveaux promulgated on 19th June 2019, which dismissed the appellant's appeal on human rights grounds.

2. The appellant served in the British Gurkha Regiment for 17 years from 30th January 1986 and was discharged on 16th December 2002 with exemplary conduct. He is married with four children born in

1982, 1984, 1986 and 1993. He made an application for entry clearance on 14th March 2018.

3. His application was refused on the basis that he had an option to settle at the time under the Immigration Rules and therefore would not qualify under IDI Chapter 15 Section 2A Annex B. Further, when he applied for entry clearance, he was over the two-year time limit imposed by paragraph 11(b)(i) of the Appendix Armed Forces and/or paragraph 276F(iii) of the Immigration Rules. The Entry Clearance Officer concluded the appellant was not a victim of historic injustice to former Gurkha soldiers and thus the claim did not breach Article 8 of the European Convention on Human Rights.

4. The Appendix Armed Forces general eligibility requirements are as follows:

> *"General eligibility requirements*
>
> *11. The general eligibility requirements to be met as a discharged member of HM Forces are that:*
>
> *(a) the applicant:*
>
> *(i) has completed a least 4 years' reckonable service in HM Forces; or*
>
> *(ii) meets the medical discharge criteria in paragraph 12; and*
>
> *(b) on the date on which the application is made:*
>
> *(i)* ***the applicant has been discharged from HM Forces for a period of less than 2 years;*** *or*
>
> *(ii) in the case of an applicant who was medically discharged more than 2 years before, new information regarding his or her prognosis is being considered by the Secretary of State; or*
>
> *(iii) the applicant has been granted his or her most recent period of limited leave;*
>
> *(aa) under paragraph 15 or 19 of this Appendix as a foreign or Commonwealth citizen who has been discharged from HM Forces; or*
>
> *(bb) under paragraph 276KA or 276QA of these Rules; or*
>
> *(cc) under the concession which existed outside these Rules, whereby the Secretary of State exercised her discretion to grant leave to enter or remain to members of HM Forces who have been medically discharged; and*
>
> *(c) in relation to an application made by a Gurkha, the Gurkha is a citizen or national of Nepal."*

5. Paragraph 276F of the Immigration Rules applies to Indefinite Leave to Remain applications for Gurkhas. Paragraph 276 (iii), requires that an applicant '*was not discharged from the British Army more than 2 years prior to the date on which the application is made*'. That rule was introduced in October 2004. The grounds to the First-tier Tribunal stated he was not aware of the change of policy. The appellant's witness statement also asserts he did not have the right to settle and could not afford the applications.

6. The grounds for permission to appeal argued that the judge erred in approach to the treatment of Article 8(1) of the European Convention on Human Rights finding, at paragraph 13 of the determination, that it was not engaged since the appellant had "no private and family life in the UK".

7. In the grounds of appeal the appellant advanced that under Section 82 of the Nationality, Immigration and Asylum Act a person may appeal against refusal of a human rights claim and the appellant was applying for his entitlement to settle in the United Kingdom which was denied him when he was first discharged in 2002. This engaged his human rights claim.

8. Further to *Bahinga (r. 22; human rights appeal: requirements) Sierra Leone [2018] UKUT 90* at paragraph 2 of the headnote:

> *"2. An application for leave or entry clearance may constitute a human rights claim, even if the applicant does not, in terms, raise human rights. In cases not covered by the respondent's guidance (whereby certain applications under the immigration rules will be treated as human rights claims), the application will constitute a human rights claim if, on the totality of the information supplied, the applicant is advancing a case which requires the caseworker to consider whether a discretionary decision under the rules needs to be taken by reference to ECHR issues (eg Article 8) or requires the caseworker to look beyond the rules and decide, if they are not satisfied, whether an Article 8 case is nevertheless being advanced."*

9. Further in *Ahmadi and Anor, R (on the application of) v Secretary of State for the Home Department) [2005] EWCA Civ 1721* the court acknowledged that, "*the obligations under Article 8 require a state not only to refrain from interference with existing life, but also from inhibiting the development of a real family life in the future.*" The court did go on to state, "*That is not to say that, … only a future intention will be sufficient to engage Article 8. …*" [18].

10. It was argued that in the case of appellant where the Appendix Armed Forces Rule was not available to him when he was discharged in 2002 and only came into force in 2004. At the time he was

discharged there was no possibility of him being able to apply for settlement and he was unable to apply for any of his children who were over the age of 18 years old at that time. It was only in January 2015 that Annex K was implemented to allow ex-Ghurkhas to apply for their children between the ages 18 to 30 years old. The respondent's decision engaged Article 8.

11. The appellant was one of the Ghurkhas who retired between 1997 and 2004 and they were unaware of their entitlement when the law changed and as such the respondent should exercise discretion before solely refusing on the time limit point.

12. Permission to appeal was granted on the basis that insufficient weight had been attached to the factors as identified given the totality of the background circumstances. Insufficient analysis was set out by the judge before reaching conclusions as to the potential weight to be attached to the factors. It was arguable Article 8 was engaged given the chronology on the footing that the appellant served the Crown as a soldier and that such service constituted an important aspect of his private life.

13. At the hearing before me Mr Balroop argued that the Article 8 had been given short shrift and there was no consideration of private or family life in the UK. There was a lacuna such that parties between 1997 and 2004 would fail the relevant criteria introduced in 2004. Mr Balroop argued that the relevant paragraphs being 17, 27 and 28 of *Limbu [2008] EWHC 2261 (Admin)* were not taken into account.

14. Ms Bassi submitted that the judge had determined at paragraph 3 that the appellant had completed his service on 16th December 2002 and could have applied in 2004 because he would have had a two-month window at that time and there was a route to settlement. She added that there was no historic injustice and it was only if historic injustice applied that Article 8 would be engaged which was not in these circumstances. The Entry Clearance Manager's review argued that without familial ties Article 8 was not engaged and it was clear that the appellant has no family in the United Kingdom. Indeed, his children all of whom are now over the age of 18 were listed as dependant on his application and living in Nepal. The judge was correct to conclude, albeit summarily that there was no family life in order to engage Article 8. The appellant had no family life in the United Kingdom, and it was open to the judge to dismiss the appeal on that basis. The judge also swiftly dealt with private life finding none was engaged.

Analysis

15. This being a human rights appeal the question is whether Article 8 was engaged.

16. The background the Gurkha litigation has been set out in *R (Gurung) v Secretary of State [2013] EWCA Civ 8* as follows

> *'2. For many years, Gurkha veterans were treated less favourably than other comparable non-British Commonwealth soldiers serving in the British army. Although Commonwealth citizens were subject to immigration control, the SSHD had a concessionary policy outside the Rules which allowed such citizens who were serving and former members of the British armed forces to obtain on their discharge indefinite leave to enter and remain in the UK. Gurkhas were not included in this policy. They were therefore not entitled to settle in the UK.*
>
> *3. In 2004, the British Government agreed to change this policy. The SSHD issued a press release in 2004 which paid tribute to the bravery of the men of the Gurkha Brigade and their unquestioning loyalty to Her Majesty the Queen. He said:*
>
> > "*I am very keen to ensure that we recognise their role in the history of our country and the part they have played in protecting us. That is why we have put together the best possible package to enable discharged Gurkhas to apply for settlement and citizenship. I hope that the decision I have made today will make our gratitude clear. Those high military standards have been mirrored by their demeanour in civilian life. Their families too have shown devotion and commitment by travelling across continents to support the Brigade.*"
>
> *4. Accordingly, in October 2004, Immigration Rules 276E to K were introduced to enable Gurkha veterans with at least 4 years' service, who had been discharged from the armed services within the past 2 years, to apply for settlement in the UK. But only Gurkhas who had been discharged on completion of engagement on or after 1 July 1997 were eligible to apply. The rationale for this restriction was that in July 1997 the Brigade of Gurkhas moved its headquarters from Hong Kong to the UK, so that after that date Gurkhas would have had the opportunity to develop close physical ties with the UK.*
>
> *5. But at the same time, the SSHD introduced a policy outside the Rules under which Gurkhas were permitted to settle in the UK even if they had been discharged before 1 July 1997 and/or more than 2 years prior to the date of application, if there were strong reasons why settlement in the UK was appropriate in the particular case by reason of the individual's existing ties with the UK. Entry clearance guidance was contained in the Diplomatic Service*

> *Procedures Chapter 29 para 14 ("DSP29.14"). This was replaced in January 2009 by the Settlement Entry Clearance Guidance, Chapter 12 para 16 ("SET12.16"). The two paragraphs were in identical terms and applied to the dependants of all former members of HM Forces (including Gurkhas). SET12.16 remained in force until September 2010, since when the only relevant policy document has been the Immigration Directorates' Instructions ("IDI") referred to at para 10 below'.*

17. Article 8 of the convention provides:

> "*Right to respect for private and family life*
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being 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.*"

18. As, however, as explained in *Adjei (visit visas – Article 8) [2015] UKUT 0261 (IAC)*

> *"The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the rules and should not do so. If article 8 is engaged, the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the rule because that may inform the proportionality balancing exercise that must follow. Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) is not authority for any contrary proposition.*

19. *Razgar v SSHD [2004] UKHL 27* acknowledging *Bensaid v United Kingdom (2001) 33 EHRR 205*, identified that not every act of the state would interfere with Article 8. Article 8 is a broad term and protects the right to identity and personal development and, further, if the if the facts were sufficiently strong article 8 may, in principle, be invoked but, even then, the interference may not be sufficiently grave to entail a breach and depended on the circumstances. As held in *Bensaid*

> *"47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that*

> *elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world".*

20. At paragraph 9 the Court in *Razgar v SSHD [2004] UKHL 27* observed

> *'This judgment establishes, in my opinion quite clearly, that reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked. It is plain that "private life" is a broad term, and the Court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the Court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In Pretty v United Kingdom (2002) 35 EHRR 1, paragraph 61, the Court held the expression to cover "the physical and psychological integrity of a person" and went on to observe that*
>
> > "*Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.*"
>
> *Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person. Professor Feldman, writing in 1997 before the most recent decisions, helpfully observed ("The Developing Scope of Article 8 of the European Convention on Human Rights", [1997] EHRLR 265, 270):*
>
> > "*Moral integrity in this sense demands that we treat the person holistically as morally worthy of respect, organising the state and society in ways which respect people's moral worth by taking account of their need for security.*"'

21. The question was whether in this instance Article 8 was engaged bearing in mind its broad nature. In *R (Limbu) v Secretary of State [2008] EWHC 2261 (Admin)* Blake J held that military service

anywhere in the world could be deemed to be service in the UK for the purpose of qualifying for residency. *Limbu* sets out at paragraph 28

> *'Since April 2007 discharge has been able to take place in the United Kingdom with the option of travel back to Nepal at public expense. Gurkhas can now also count military service anywhere in the world towards the period of qualifying residence deemed to be in the United Kingdom, for the purposes of naturalisation, although citizenship can only be granted once they have left the Brigade of Gurkhas. These changes were made without objection from the Government of Nepal, just as earlier they had no objection to indefinite leave to remain being granted to Gurkhas'*

22. I also appreciate the observation of Blake J at paragraph 47 of *Limbu* where he proceeded to rule on Article 14 on the basis of the engagement of Article 8 (without conceding that it had been infringed) where he observed

> *'... the proposition that a policy on indefinite leave to remain on the grounds of close links with the United Kingdom was a policy designed in part to promote the private and family life of those eligible for admission just as immigration rules on family reunion promote or have impact on the ability to enjoy family life (Abdulaziz and Cabales v United Kingdom (1985) 7 EHRR 471). It is clear that one does not need an individual right to be infringed before Article 14 can come into play; it is sufficient that the law or policy complained of is within the ambit of the Article and reflects the principles and interests protected by the Article in question. Although Mr. Kovats opposed even this narrower formulation of the ambit of Article 14, I am prepared to assume for the purpose of this case that it may be right and that I should accordingly test the legality of the policies under challenge by reference to Article 14'.*

23. In this case, however, and unlike *Limbu*, which addressed the rights of those discharged prior to 1997, there was a window of opportunity for the appellant to apply for Entry Clearance, that being in 2004. The personal choices of the applicant at the time is, in my view, too remote to justify the invocation of a private life on human rights grounds 15 years later. *Limbu* was principally considered on the basis of an attack on operative policy not on human rights grounds; *Gurung* was not argued on human rights grounds but on the basis of the historic injustice and the policy of redressing the historic injustice whereby, but for previous immigration rules, Gurkhas would have been permitted to settle in this country. After so many years have elapsed, I am not persuaded that there is any positive obligation on the United Kingdom, even in the case of Gurkhas, to recognise the private life of the appellant in Article 8 terms, when there was indeed

an opportunity for the appellant to enter the United Kingdom. The appellant asserts he was prevented from applying in 2004 when all his family (because of his adult children) were unable to accompany him because of the policy operated by the British government at the time but many Gurkhas did resettle in the United Kingdom, albeit at the time their children could not accompany them, only for their children to join them sometime later.

24. The point made with regard *Limbu* and deemed residence ignores the fact that the Immigration Rules, of which the appellant could have availed himself, allowed appellants to apply up to two years after discharge. The immigration rules in relation to long residence under Paragraph 276A(a)(v) consider continuous residence to be broken if an applicant has spent a total of more than 18 months absent from the United Kingdom during the period in question. I realise that that rule applies to 276B to 276D and 27ADE and obtaining leave on the grounds of long residence, is not exactly analogous, but the principle of 'lapse' of entitlement to leave or rather lapse of connection with the United Kingdom is illustrated and must be a relevant as an important factor when considering whether the appellant's private life in relation to the UK for the purposes of Article 8 endures.

25. If this removes the 'Gurkha' element as I find it does, it would be necessary to consider the matter on ordinary principles. Although Article 8 might include physical and moral integrity and self-development and relations with others, the 'self-development' of the appellant in this instance and after all this time is in Nepal and not in the United Kingdom. His physical and moral integrity is not impaired by the United Kingdom refusing entry clearance because he did have that opportunity. The scope of the term 'home' is generally taken to mean where a person lives on a settled basis and 'the physically defined area where private and family life develops' *Murray v UK (1994) 19 EHRR* and I am not persuaded that personal self-development or home can extend to a place where a person has never lived or the development of personal identity or autonomy extended to removal to another country where there are no familial ties.

26. Lord Justice Burnett in *Secretary of State v Abbas [2017] EWCA Civ 1393* authoritatively held at paragraph 18

> *'The Secretary of State has been unable to identify any case, still less a settled line of authority, in which the Strasbourg Court has held Article 8 in its private life aspect to be engaged in respect of a person outside the Contracting State seeking to enter to develop that private life'. [18].*

and at 27

> *'There is no obligation on an ECHR state to allow an alien to enter its territory to pursue a private life. Article 8 was not engaged in the respondent's application for entry clearance for his family to visit the United Kingdom. No question of proportionality arises for consideration' [27].*

27. The House of Lords in *Huang v Secretary of State [2007] UKHL 11* at paragraph 18 confirmed

> *'The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment'.*

28. Again, from *Abbas* at paragraph 24 it was held:

> *'The consistent approach of the Strasbourg Court to the question whether someone is within the jurisdiction of a Contracting State for the purpose of article 1 is to emphasise that it is primarily territorial. However, in exceptional circumstances acts producing effects outside the territory of a Contracting State may constitute an exercise of jurisdiction: see Al-Skeini v United Kingdom (55721/07) (2011) 53 EHRR 18 at paragraph 131. None of the exceptions thereafter identified by the Strasbourg Court has any bearing on the facts of this case'.*

29. Albeit the appellant is a 'Gurkha' I am not persuaded that this is one of the exceptional cases which should engage Article 8 and even if it were engaged, which I do not accept, the state has a much wider margin of appreciation in determining the conditions to be satisfied in an entry clearance case by contrast with the position for those applying for leave to remain. *Ahmadi and Anor, R (on the application of)* does not apply in this instance because the state is not inhibiting the family life of this appellant which is constituted in Nepal where he and all his children remain.

30. Therefore, although the judge made a brief summation of the position with regard the appellant, I find the essence of his conclusion properly made and the brevity of his decision not material. The First-tier Tribunal decision will stand.

31. The appeal remains dismissed on human rights grounds.

No anonymity direction is made.

Signed Helen Rimington Date 28th November 2019

Upper Tribunal Judge Rimington