Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/15291/2012

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 19 November 2013	**On 5 December 2013**

Before

THE PRESIDENT, THE HON MR JUSTICE McCLOSKEY
UPPER TRIBUNAL JUDGE TAYLOR

Between

BINDU RAI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

Appellant:	Mr Saldanha, of Howe and Company, Solicitors
Respondent:	Miss Z. Kiss, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

[1] The underlying decision in this appeal is that of the Entry Clearance Officer ("*the ECO*"), the Respondent herein, whereby the application of the Appellant for indefinite leave to enter the United Kingdom as the dependent relative of a person

present and settled here was refused. The Appellant appealed to the First-Tier Tribunal (hereinafter "*the Tribunal*"), unsuccessfully. Having secured permission, the Appellant now appeals to the Upper Tribunal.

Immigration Rules and the Secretary of State's Policy

[2] We begin with the relevant provisions of the Immigration Rules. The subject matter of Part 8 is "*family members*". Paragraph 317 prescribes the requirements for indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom. Paragraph 317 stipulates, insofar as relevant to the present case, that the applicant –

> "*(i) Is related to a person present and settled in the United Kingdom in one of the following ways ……*
>
> *(f) The son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional circumstances; and*
>
> *(ii) Is joining or accompanying a person who is present and settled in the United Kingdom ….*
>
> *(iii) Is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and*
>
> *(iv) Can, and will, be accommodated adequately, together with any dependents, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and*
>
> *(a) Can, and will, be maintained adequately, together with any dependents, without recourse to public funds; and*
>
> *(v) Has no other close relatives in his own country to whom he could turn for financial support; and*
>
> *(vi) If seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity; and*
>
> *(vii) Does not have one or more unspent convictions within the meaning of the Rehabilitation of Offenders Act 1974.*"

By virtue of paragraph 318 of the Rules, the production of a valid entry clearance certificate is a pre-requisite to admission to the United Kingdom, upon arrival.

[3] The operative provisions of the Immigration Rules must be considered in conjunction with a relevant policy of the Secretary of State for the Home Department ("*the Secretary of State*"). This is promulgated in the Immigration Directorate Instruction ["IDI"] Chapter 15, section 2A, paragraph 13.2. In its current form this policy dates

from March 2010. The purpose and scope of this policy are explained in the following introductory statement:

> "*This section deals with applications from Ghurkhas and foreign and Commonwealth nationals who seek settlement in the UK on discharge from HM Forces. It also explains the circumstances under which their dependents may apply for settlement.*"

The policy cross refers to paragraph 276 of the Immigration Rules. This contains a series of discrete provisions relating to the grant of indefinite leave to enter the United Kingdom to Ghurkhas, who are defined as citizens or nationals or Nepal who have served in the Brigade of Ghurkhas of the British Army. Within the Secretary of State's policy there is a discrete section relating to the dependents of Ghurkhas aged over 18 years. Paragraph 13.2 states:

> "*Dependents over the age of 18 of foreign and Commonwealth HM Forces members (including Ghurkhas) who are not otherwise covered in this guidance would normally need to qualify for settlement in the UK under a specific provisions of the Immigration Rules …..*
>
> *In exceptional circumstances discretion may be exercised in individual cases where the dependent is over the age of 18 …..*
>
> *However, settlement applications from dependents over the age of 18 who are the children of* ***serving*** *foreign and Commonwealth HM Forces members (including Ghurkhas) who meet the requirements of a parent should normally be approved, provided the dependent has previously been granted limited leave to enter or remain in the UK as part of the family unit and they wish to continue to reside and be educated in the UK.*"

The ECO's Decision

[4] In her application for entry clearance, the Appellant stated that she was seeking to enter the United Kingdom on the basis of "*HM Forces discretion*". She identified the sponsor as her father, a Ghurkha now aged 53 years, who is settled in the United Kingdom. In an accompanying letter written by her solicitors, it was contended that the Appellant should be granted entry on the basis of exceptional circumstances, which were articulated thus:

> "*Our client is the only remaining dependent child of her father, a Ghurkhas veteran, who wishes to settle in the UK …… We submit that exceptional circumstances exist in our client's case. If the sponsor had been allowed to apply for settlement on discharge from the Brigade of Ghurkhas on retirement, our client would have qualified for settlement as his minor dependent. The historic injustice as recognised by the High Court is a factor that should weigh heavily in our client's favour.*"

It was further contended that a refusal of entry clearance to the Appellant would infringe her rights under Article 8 ECHR. In support of this contention, the solicitors drew attention to the decision of the Court of Appeal in **JB (India)** [2009] EWCA Civ 234, together with certain decisions of this Tribunal.

[5] In his decision, the ECO acknowledged that the Appellant's father is present and settled in the United Kingdom, having been granted indefinite leave to remain on 6th July 2006. It was noted that some four months later, settlement visas were issued to the Appellant's mother and her two siblings, then aged 7 and 17 years respectively. The ECO determined, firstly, that the Appellant's application did not satisfy the requirements of paragraph 317 of the Immigration Rules. This seems to us uncontroversial, having been conceded in the written representations of her solicitors. The ECO then proceeded to consider the application under the Secretary of State's policy. He concluded that the Appellant had not demonstrated any exceptional circumstances. In thus concluding, he highlighted that the sponsor/adult daughter relationships had no atypical features; the Appellant had no medical conditions or disability; she had reasonable housing accommodation and income producing land; she had qualified as a doctor and had chosen to pursue her studies, rather than seek employment; and she had previously submitted two unsuccessful applications for settlement and visit visas, one resulting in an unsuccessful appeal. Finally, the ECO concluded that a refusal of entry clearance would not engage Article 8(1) ECHR or, alternatively, would not interfere disproportionately therewith. The ECO recorded, specifically, that the Appellant had not resided with her parents since 2005; her professional qualifications were such that she could be self supporting financially; and she did not appear to have a close relationship with her siblings.

The Determination of the First-tier Tribunal ("FTT")

[6] The Appellant duly exercised her right of appeal. It is recorded in the Determination of the FTT that, as presented by her legal representative, the Appellant's primary case was under Article 8 ECHR and her secondary case was based on the Secretary of State's policy. The witnesses who testified were the Appellant's parents. The Judge made a specific finding that the Appellant's father makes a significant financial contribution to her upkeep and outgoings. Based on his analysis of the earnings of the Appellant's father and mother, he found that they had at their disposal, some £1,084 per month for this purpose. As this would be available in the event of the Appellant entering the United Kingdom and residing with them, he further found that she would be adequately maintained and accommodated. The Judge then considered the Appellant's Article 8 case. He did so extensively and sympathetically. He did not, however, make any explicit findings or conclusions. While he **appeared** to be travelling in the direction of a conclusion that the impugned decision did not interfere with the right to respect for family life vis-à-vis any of the five members of the family unit concerned, he did not so conclude explicitly.

[7] The Judge then turned to consider the Secretary of State's policy. He stated, in paragraph [41]:

> "*There are three aspects of the decision with which I have concern. The first relates to the Respondent's conclusion, considered in respect of paragraph 317, that the Appellant was not financially supported by her father …….*
>
> *I am satisfied, for reasons I have already given, that the Appellant was, at the date of decision, financial dependent on her father ……..*
>
> *Secondly, there is no indication in the Notice of Refusal that the Respondent has given any consideration to the 'stranded sibling' principle ……..*
>
> *Although the most recent IDS do not make specific reference to this purpose it clearly remains a relevant and material consideration. The failure to give any indication that this principle had been considered indicates that the Respondent failed to take account of a relevant consideration ……..*
>
> *Thirdly, there is no consideration in the Notice of Decision in respect of the exemplary service given by the Appellant's father (and, possibly, grandfather).*
>
> *Nor was there any acknowledgement of the past historical wrong identified in* ***Gurung*** *in respect of the previous discriminatory treatment received by Ghurkhas in comparison to other British soldiers. I accept the father's evidence that, had he been able to apply for settlement when he was discharged, he would have applied for settlement for himself and his family. The decision under appeal does not acknowledge these highly relevant considerations.*"

Having identified and elaborated upon these three factors, the Judge concluded:

> "*Having regard to my three concerns identified above, I am persuaded that the decision was not in accordance with the law because the Respondent failed to take account of relevant considerations. I therefore allow the appeal to the limited extent that it is remitted back to the Respondent to make a lawful decision in respect of the application of the 'exceptional circumstances' policy.*"

The Judge dismissed the appeal under the Immigration Rules and under Article 8 ECHR.

[8] To summarise, the FTT:

(a) dismissed the appeal under the Immigration Rules.

(b) dismissed the appeal under Article 8 ECHR.

(c) found that the Secretary of State's decision was vitiated on account of a failure to take into account four material considerations viz that the Appellant is

financially dependent on her father; the "stranded sibling" principle; the exemplary British Military service given by the Appellant's father (and, possibly, grandfather); and the **Gurung** "past historical wrong" factor.

(d) pursuant to (c), allowed the appeal to the limited extent of remitting the matter to the Secretary of State to make a lawful decision in respect of the application of the IDI Policy (*supra*).

THE SCOPE OF THIS APPEAL

[9] One of the striking features of this further appeal is that the Appellant was successful at first instance, in the sense and to the extent explained above. Successful litigants can, of course, appeal in certain contexts and we are satisfied that this is one of them, having regard to the rejection of the Appellant's appeal to the FTT on certain grounds and the limited nature of the success secured by her in that forum. In granting the Appellant permission to appeal, Upper Tribunal Judge McGeachy, having observed that the Respondent had not challenged the Judge's decision to require a lawful fresh decision to be made, reasoned as follows:

> "*I consider that it is arguable that the Judge should have weighed that in the balance in the proportionality exercise the reasons for which he found that the decision was not in accordance with the law and that there is an arguable error of law in his not doing so.*"

The relationship between the grant of permission to appeal and the Appellant's grounds of appeal is not entirely clear, possibly on account of the inadvertent intrusion of the second "*that*" in the passage quoted above, which has disturbed the syntax somewhat. It is clear, in any event, from the reference to Article 8 ECHR that the Judge intended to grant permission to appeal under this heading. We draw attention to the grounds, which embodied the following contentions:

(a) The Tribunal had erred in law by misdirecting itself in its Article 8 assessment, specifically by failing to consider **AA – v – United Kingdom** [2012] IMM Ar 1, paragraph [49] especially, and by failing to provide sufficient reasons for not finding that the Appellant had met the threshold established by the decision in **Ghising** (which the Judge had considered in paragraph [29]).

(b) The Judge had erred in law by misdirecting himself that emotional dependency had to be shown (and, by implication, had not been demonstrated) in order to establish the Appellant's right to respect for family life under Article 8(1) ECHR.

(c) The Tribunal erred in law, by inadequate reasoning and irrationality, in holding the sponsor's military service irrelevant to the existence of family life, the contention being that prior separation of family members is relevant to the strength of the surviving emotional bonds.

In short, the grounds of appeal complained that the Tribunal had erred in law in its consideration and resolution of the Appellant's case under Article 8.

Consideration and Conclusions

[10] Mr Saldanha, on behalf of the Appellant, accepted that the appeal was proceeding on Article 8 ECHR grounds only and refined his argument to two submissions. The first was that the FTT had misdirected itself in law by considering that emotional dependency had to be demonstrated in order to make good the Appellant's case under Article 8 ECHR. He based this submission on **Pun and Others (Gurkhas – Policy – Article 8) Nepal**, [2011] UKUT 00117. In paragraph [22] of **Pun**, the Upper Tribunal considered the decisions of the House of Lords in **Razgar** [2004] UKHL 27, **Huang** [2007] UKHL 7 and **EB (Kosovo)** [200] UKHL ……, quoting the following extract from the opinion of Lord Bingham in the latter case:

> "*Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural conditions in the country of origin* ***and many other factors*** *may all be relevant.*"
>
> [Our emphasis]

Next, the Upper Tribunal noted that in **Kugathas – v – IAT** [2003] EWCA Civ 31, the Court of Appeal held that family life between an adult child and parent or other sibling requires the demonstration of something more than normal emotional ties: per Arden LJ, paragraph [25]. The Tribunal accepted that this **could** [our emphasis] be established by proof of "*a strong family bond and financial dependence*", while opining that this should not be considered "*a necessary requirement or as determinative of the issue of whether there is family life within Article 8*". It emphasised, in paragraph [24], the contextual and fact sensitive nature of every Article 8 case.

[11] Basing his argument on the passages in **Pun and Others** to which we have referred above, Mr Saldanha submitted that misdirections in law are evident in paragraphs [30] and [34] of the FTT Determination. Within these passages, the Judge rehearsed certain facts which prompted him to find that the Appellant was clearly **financially** dependent on her family during the five year period of her third level education in China, between 2005 and 2010. He recorded that between 2005 and 2006 her mother and two younger siblings were resident in Nepal, following which all three secured entry clearance to reside in the United Kingdom, duly exercised in early 2008. The Appellant applied unsuccessfully for settlement in the same year. She then returned to China and continued to study there. She made no further application to enter the United Kingdom until seeking a visitor's entry visa in 2011 (fully three years later, we would observe). At this stage she was preparing for post graduate studies in Nepal, having qualified as a medical doctor. The Judge stated:

> "*This indicates that the Appellant is an intelligent, capable and resourceful individual, albeit that she is reliant financially, directly and indirectly, on her father.*"

Next, in paragraph [31], having rehearsed certain relevant evidence, the Judge rejected the submission that the Appellant is **emotionally dependent** on her parents. He then reminded himself of the requirement to consider every case on its individual facts and merits. Having done so, he continued:

> "*[34] Whilst I have no reason to disbelieve the evidence that the family are close their emotional attachment does not appear to be any different from the normal emotional bonds that exist between adult children and their parents ….. There is no evidence of any significant emotional reliance ….*
>
> *[35] ……. The Appellant cannot be considered a young child. She was over 25.5 years old at the date of decision and had lived apart from her family since 2005.*"

[12] We are satisfied that there was no misdirection in law by the Judge. In the paragraphs under scrutiny, the Judge was, properly, undertaking the exercise of examining the factually sensitive nature of the case before him. He also addressed specifically, and proceeded to determine, a submission that the Appellant was emotionally dependent on her parents. This we consider irreproachable. We find nothing in these passages to suggest that the Judge elevated the factor of emotional dependency to a necessary pre-requisite of a successful Article 8 claim. We reject this ground of appeal accordingly. In doing so, we are mindful that in **R (Gurung) – v – Secretary of State for the Home Department** [2013] EWCA 8, the Court of Appeal stated, in paragraph [50]:

> "*The critical issue was whether there was sufficient dependence, and in particular sufficient emotional dependence, by the Appellants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the FTT to determine. In our view, the FTT was entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent.*"

This passage confirms, firstly, the truism, frequently emphasised, that every case is factually sensitive and, secondly, that it will often be proper to consider and determine the issue of emotional dependence in Article 8 cases involving adult children such as this Appellant.

[13] The second discrete submission advanced on behalf of the Appellant resolved to the contention that the FTT had erred in law by failing to take into account that the Appellant's younger brother is a minor. The gist of this submission appears to us to be that the FTT failed to properly appreciate the composition of the Appellant's family. The evidence before the Tribunal included a witness statement of the Appellant's father which, *inter alia*, drew attention to the age of the youngest of the three children (who was born on 25th January 1999 and is now aged 14 years) and his student status. Furthermore, the evidence included the younger brother's entry visa,

which contains all of his relevant particulars. In addition, the family circumstances were rehearsed by the Judge in paragraph [2] of the Determination. We have no warrant for concluding that the Judge failed to take into account that the Appellant's younger brother is a minor. We can identify no misdirection in law in this respect and we reject this submission accordingly.

DECISION

[**14**] For the reasons elaborated above, we dismiss the appeal and affirm the decision of the FTT.

Signed: 

The President
The Honourable Mr Justice McCloskey

Dated: **26 November 2013**