Upper Tribunal
(Immigration and Asylum Chamber)

KG (Gurkhas– overage dependants – policy) Nepal [2011] UKUT 00117 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Determination Promulgated**

on 24 January 2011

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Before

SENIOR IMMIGRATION JUDGE McKEE

Between

ENTRY CLEARANCE OFFICER, NEW DELHI

Appellant

and

KG

Respondent

Representation :

For the appellant: Mr John Parkinson, Senior Presenting Officer

For the respondent: Mr Christian Howells , instructed by N.C. Brothers & Co.

Neither the concession in Limbu [2008] EWHC 2261 (Admin) nor the judgment of Blake J can be regarded as giving any rights to an over-age dependant family member of a former Gurkha.

DETERMINATION AND REASONS

1. On 8 May 2008 Miss KG, a citizen of Nepal then aged 35 (who is now the respondent before the Upper Tribunal, but whom I shall for convenience continue to refer to as 'the appellant'), applied for entry clearance as the dependant of her father, who had retired from the Brigade of Gurkhas in 1984, but in 2006 had obtained settlement in the United Kingdom on the strength of his military service. Her application was refused on 4 June 2008 under paragraph 317 of the Immigration Rules, and on 23 June 2008 notice of appeal was given, contending that the application ought to have been considered under the policy set out at Chapter 29 of the Entry Clearance Guidance, dealing with ' **Settlement entry for former members of HM Forces and their dependants** '. In particular, the appellant was said to satisfy the criteria laid down at paragraph 29.14, while Article 8 ECHR was also invoked. Despite this, when the decision was reviewed by an Entry Clearance Manager on 15 June 2010, regard was had instead to Chapter 15, section 2A, paragraph 13.2 of the Immigration Departmental (sic) Instructions, which require " exceptional circumstances " before an overage child can be admitted.

2. The gap of nearly two years between the original decision and the review is to be explained by the celebrated High Court proceedings in Limbu & ors [2008] EWHC 2261 (Admin) and the policy review which followed. In this case, Mr Justice Blake considered Chapter 29 of the Entry Clearance Guidance (or Diplomatic Service Procedures, as they are called in his judgment) in so far as they provided for the admission of Gurkhas seeking settlement in the United Kingdom after their discharge from HM Forces, who were not admissible under paragraphs 276E-K of the Immigration Rules. In particular, his Lordship had to analyse the discretion given to ECOs under paragraph 29.4 " where an applicant does not meet the requirement of discharge from the British Army in Nepal after 1 July 1997, or discharge not more than 2 years prior to the date of application. Discretion may be exercised to waive those requirements in cases where there are strong reasons why settlement in the UK is appropriate ." Four bullet points are then set out, listing factors which should be considered in exercising the discretion. " If one or more of the factors listed above are present ", the paragraph continues, " ECOs may exercise discretion and grant entry clearance for settlement in the UK ."

3. In his submissions to the High Court, recorded at paragraph 58(iv) of the judgment, counsel for the defendant Secretary of State and Entry Clearance Officers said this about the discretion given by Chapter 29.4: " This is a judgment formed by the individual ECO using the factors as a guide. If one or more of the identified factors existed discretion should be exercised favourably, but it could be so exercised if other unspecified considerations led to the same conclusion ." In the end, however, Blake J concluded (paragraph 71) that " the instructions given to ECOs are unlawful and need urgent revisiting ." It was up to the Home Office to revise the policy, so as to honour the historic debt owed to Gurkhas who had been discharged before 1 July 1997, having given loyal service to this country.

4. His Lordship had nothing to say about the policy in Chapter 29.14 of the DSPs, which was the focus of the present appeal when it came before Designated Immigration Judge Bowen on 24 August 2010. This paragraph is headed ' **Dependants over the age of 18** ', and I will set it out in full below.

"It is not the intention to split a family unit solely because a dependant is 18 years of age or over. Applications for settlement from dependants who are 18 years of age or over will be considered and discretion to grant settlement outside the Rules may be exercised in individual cases. Dependants over the age of 18 need to make separate, individual applications and pay the appropriate fee. In assessing whether settlement in the UK is appropriate ECOs should consider the following factors:

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One parent or a relative of the applicant is present and settled, or being admitted for, or being granted, settlement in the UK under the HM Forces rule;

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The applicant has previously been granted limited leave as a dependant of a member of HM Forces;

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The applicant has been, and wishes to continue, pursuing a full-time course of studies in the UK;

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Refusal of the application would mean that the applicant would be living alone outside the UK and is financially dependent on the parent or relative present and settled, or being granted settlement in the UK under the HM forces rule;

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The applicant would find it very difficult to function because of illness or disability without the help and support of their parent or close relative in the UK.

If one or more of the factors listed above are present, the ECO may exercise discretion and grant entry clearance for settlement in the UK."

5. DIJ Bowen found that this policy had not been considered either by the ECO who made the original decision in June 2008 or by the ECM who reviewed that decision in June 2010. That, Judge Bowen held, made the decision 'not in accordance with the law' in terms of s. 84(1)(e) of the Nationality, Immigration and Asylum Act 2002, and it is not in dispute that he was right so to hold. It is what he did next that has caused the appeal to reach the Upper Tribunal. Having found on the evidence before him that the appellant was living alone in Nepal, was financially dependent on her father settled here, and would because of an illness or disability find it very difficult to function without the help and support of her father, the judge considered that the appellant met the requirements of the first, fourth and fifth bullet points set out in Chapter 29.14. While acknowledging that the normal course, where a relevant policy has not been applied by the respondent, is for the immigration judge to allow the appeal to the limited extent that the decision under appeal was not in accordance with the law, so that the application remains outstanding before the respondent, Judge Bowen took the view that the terms of this policy were so precise, and were so clearly satisfied by this appellant, that only one outcome was rationally possible. He allowed the appeal outright, and directed that entry clearance be granted.

6. As justification for this unusual course, the judge cited AG & ors (policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 82 and IA (applying policies) Mauritius [2006] UKAIT 82. In particular, reliance was placed on paragraph 50 of AG :

"For ourselves, we have little doubt that – contrary to the submissions on behalf of the Secretary of State before us – there are cases in which a finding that a decision is 'not in accordance with the law' on the ground of failure to apply a policy should lead to a substantive decision in the claimant's favour, with a direction that leave be granted. … But the cases in question are unusual. They are those in which (1) the claimant proves the precise terms of the policy, which (2) creates a presumption, on the facts of his case, in favour of granting leave, and (3) there is either nothing at all to displace the presumption, or nothing that, under the terms of the policy , falls for consideration. If all those factors apply to the case, the appeal should be allowed, with a direction as indicated."

7. In the grounds of appeal to the Upper Tribunal, it was contended that no such presumption as is mentioned in AG (Kosovo) was created by Chapter 29.14 of the Entry Clearance Guidance. It was also contended that the First-tier judge had erred in giving a direction to the Entry Clearance Officer, this being contrary to EA (family visitor, directions, mistake of fact – unfairness) Ghana [2005] UKAIT 108. The second ground was not pursued before me, but it may be worth remarking that EA (Ghana) is not authority for a proposition that an immigration judge should never make a direction in an entry clearance case. Indeed, AG (Kosovo) specifically enjoins a judge who, in the very unusual circumstances described therein, allows an appeal outright under a policy, to give a direction for leave to be granted.

8. The first ground was, on the other hand, the focus of very lucid and persuasive submissions when the appeal came before me today. I shall not set out those submissions in extenso , but shall refer to them in giving my reasons for concluding that the policy contained in Chapter 29.14 of the Diplomatic Service Procedures/Entry Clearance Guidance (and more recently appearing in the document SET 12) is not of such a kind that an immigration judge can allow an appeal outright if he thinks that the

appellant comes within the terms of the policy. Bullet points being a feature of this particular policy, I shall give my reasons also in bullet point form.

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Mr Howells sets great store by the fulsome praise bestowed upon the Gurkhas by both the Prime Minister and the Home Secretary when, in 2004, a new policy was announced which would permit settlement in the United Kingdom by Gurkhas discharged from the British Army after the handover of Hong Kong to China, provided that they had served for at least four years in the Brigade of Gurkhas and that they had been discharged not more than two years before the date of their application for indefinite leave. This policy entered the Immigration Rules on 25 October 2004 as paragraphs 276E-K of HC 395. It does not, of course, provide for the admission of Gurkhas who left the British Army before 1 July 1997, and the sponsor in the instant case left the Army in 1984. Mr Howells contends that the acknowledgment by the holders of two of the Great Offices of State that this country owes the Gurkhas a great debt of gratitude somehow invests the policy catering for Gurkhas who fall outside the Immigration Rules, and their family members, with a peculiar status, requiring its terms to be applied broadly and generously. I do not think, however, that Chapter 29 of the DSPs can be distinguished in this way from other policies.

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Mr Howells prays in aid the concession made on behalf of the Secretary of State in Limbu , when Steven Kovats of counsel suggested a way of exercising the discretion embodied by Chapter 29.4, dealing with Gurkhas who did not meet the requirements of paragraphs 276E-K of HC 395. If one or more of the factors listed at the four bullet points were present, then the guidance that " ECOs **may** exercise discretion and grant entry clearance " ought to be read as " ECOs **should** exercise discretion ." In the same way, says Mr Howells, the identical phrase at Chapter 29.14 ~ " If one or more of the factors listed above are present, the ECO may exercise discretion and grant entry clearance " ~ ought to be read with 'should' being substituted for 'may'. That cannot, in my view, be right. Chapter 29.14 was wholly outside the purview of the Limbu case, which was only concerned with the admission of Gurkhas, not with the admission of the overage dependants of Gurkhas. Besides, Chapter 29.14 concerns not just the dependants of Gurkhas, but the dependants of other foreign and Commonwealth nationals who were members of HM Forces.

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There is a stronger reason for not construing the terms of Chapter 29.14 as if they were contained in a statute or, given the elevation of the Immigration Rules – as held in Pankina [2010] EWCA Civ 719 – into quasi-law, in an immigration rule. Policies are, by their nature, intended to be implemented flexibly and sensibly. They may well be drafted more loosely that a rule or statute. That is certainly the case here. The first of the five bullet points requires the applicant to have a parent or a relative settled, or about to become settled, here under the HM Forces rule (i.e. paragraphs 276E-Q of HC 395, covering both Gurkhas and other foreign and Commonwealth nationals who have been discharged from HM forces). But that is also required by the minor children of former members of HM Forces, who have an entitlement to indefinite leave under paragraphs 276X-Z of HC 395. If the policy were to be read literally, and if its terms were mandatory, then entry clearance for settlement would have to be granted to overage dependants, since having a parent settled under the HM Forces rule is one of the five factors listed in the policy, and only one of the factors need be present for discretion to be exercised. That would eliminate any distinction between overage and minor children, and render the other four bullet points otiose. Indeed, the policy is not confined to overage children but embraces

any relative over 18 of a former soldier. It would be astonishing if the policy envisaged the admission of all dependent relatives. The first bullet point does not even require dependency.

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A further example of how the policy is not to be construed with all the strictness of a statute comes at the fourth bullet point. Mr Parkinson is, I think, right when he says that the wording " refusal of the application would mean that the appellant would be living alone outside the UK " envisages a situation where the ex-soldier has obtained settlement in the UK and is calling his wife and children to join him. One of those children is over 18, and if the rest of the family depart for the UK, he will be left behind as a 'stranded sibling'. That is the kind of scenario which the fourth bullet point is intended to avoid, says Mr Parkinson. It is not intended to facilitate the admission of a middle-aged child who has not lived with his parents for many years. But on a literal reading, a child of any age would have to be admitted, if living alone and financially dependent.

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There is a problem with the interpretation of " living alone ". Mr Howells cites KC & ors [2007] EWCA Civ 327 as an aid to construction, but in that case the court was looking at the phrase as it occurs in paragraph 317(i)(e) of the Immigration Rules, and could not see what it added to the already high hurdle of " the most exceptional compassionate circumstances ." The court did not in fact venture to define what " living alone " meant, but thought that a mother who would have the support and companionship of two teenage children (the scenario in KC itself) could not be described as 'living alone'. In the instant case, the appellant is living at her father's house, which she shares with her uncle and his children. She is not without support and companionship from them.

9. Mr Parkinson also regards the fifth bullet point as loosely worded, but enough has been said, I think, to show that this is not the kind of policy whose terms are so precise that an immigration judge can pronounce himself satisfied that, on his findings of fact, the terms of the policy have been met and that the appeal should accordingly be allowed outright. The correct course, if the ECO has not considered the policy, is to allow the appeal only to the extent that the application for entry clearance remains outstanding, for a lawful decision to be taken. DIJ Bowen therefore erred in law by allowing the instant appeal outright under the policy.

10.
The judge did not consider the appeal at all under Article 8, although that had been raised in the Notice of Appeal, because he was allowing the appeal on a different basis. That actually is the opposite way round to what is recommended by AG (Kosovo) , the first headnote to which runs as follows:

"If human rights are argued, they should be determined in advance of any argument based on discretion: if the claimant's human rights entitle him to enter or remain in the United Kingdom, any discretionary power to allow him to do so is otiose."

11. As it was now incumbent upon me to re-make the decision on the appeal, and as human rights had been raised but not dealt with at first instance, I proposed to the parties that I would consider whether the appeal should be allowed under Article 8. If it were, that would be the end of the matter. If it did not succeed under Article 8, the application for entry clearance would still have to be considered by the ECO under the policy. The sponsor (the appellant's father) was present at the hearing, as was the appellant's brother, who is himself serving in the Brigade of Gurkhas and is currently stationed in this country. But Mr Howells was content to proceed by way of submissions only, based upon DIJ Bowen's findings of fact, which had not been challenged in the application for

leave to appeal to the Upper Tribunal. Mr Parkinson warned that the evidential foundation for some of those findings might be somewhat shaky, but in the end that turned out not to be so. Again, I shall not attempt to set out fully the representatives' very thorough and detailed submissions, but will refer to them in the course of my findings below.

12. Although DIJ Bowen does not expressly say so, it is plain that he finds the account given of the appellant's situation, both in her own witness statement and in the witness statement and oral evidence of her father, to be entirely credible. Essentially, the appellant always lived with her parents until, in 2006, they went as visitors to the United Kingdom to attend her brother's passing out parade, and it was ascertained that her father could settle here. The appellant had been left in the care of her paternal uncle, but her mother returned to Nepal after obtaining indefinite leave to remain, and has spent much of the intervening period in Nepal, looking after the appellant.

13. The appellant suffers from what a cardiologist described in 2008 as " seizure disorders with mental retardation ", but a CT scan taken by a radiologist when the appellant was 25 years old (the date is given in the Nepalese calendar, but the year would be 1998) detected no brain abnormalities. The two most recent medical notes both date from April 2010, and in one Dr Thapa, a senior consultant physician, certifies that the appellant is suffering from mental retardation and chronic seizure disorder, while in the other certifies that the appellant " is otherwise physically fit and not suffering from any communicable disease ." Mr Parkinson thought the medical evidence unclear and contradictory, but I do not think there is any contradiction between Dr Thapa's two letters of April 2010, while there is in the Appellant's Bundle a whole series of attendance notes and prescriptions showing visits to hospitals and doctors over many years, and indicating a continuous need for medication. It is clear that there is something the matter with the appellant, even if the diagnosis is not as precise as one would expect in this country. Apart from anything else, the fact that the appellant has reached the age of 38 without being married strongly suggests that a malady has prevented her from doing what would be expected of her in her culture.

14. Albeit the appellant has had to rely on her uncle when her mother has not been there, the sponsor facilitates this by sending generous remittances to Nepal, amounting to £1,000 a year for her upkeep and for her medication. I accept the sponsor's explanation that he did not arrange for her visa application sooner, because he needed to establish himself in this country first, and get a job. He is clearly very keen to have the appellant live here, where her four siblings are all now established, and he has gone to considerable trouble and expense to try to bring this about.

15. Turning now to the five questions posed by Lord Bingham in Razgar [2004] UKHL 27, I find that there is family life between the appellant and her parent, going beyond the normal emotional ties spoken of in Kugathas [2003] EWCA Civ 31 between an adult child and her parents, and that the refusal of entry clearance interferes with that family life in a manner sufficiently grave to engage the operation of Article 8. The appellant's mental state renders her dependent upon her parents in a way that a normal adult would not be. The third and fourth questions are to be answered in the affirmative, but in coming to the proportionality balancing exercise required by the fifth question, I think that the public interest in maintaining firm and fair immigration control is not as strong as usual.

16. There are two reasons for this. First, the existence of a policy outside the Rules, providing for the admission of overage relatives of former soldiers on much more generous terms than paragraph 317 of the Rules, makes the exclusion of this overage relative harder to justify, especially as she appears to meet criteria in the policy which would attract a favourable exercise of discretion. Secondly, if

Gurkhas had not had to wait until 2004 before becoming able to settle in the United Kingdom, it would have been possible for the appellant to come to this country while she was still a minor. This may not be an 'historical wrong' as severe as that perpetrated upon female British Overseas citizens, which played a part in the Article 8 balancing exercise conducted by a Presidential panel of the Tribunal in NH (female BOCs, exceptionality, Art 8, para 317) India [2006] UKAIT 85, and subsequently approved in NH (India) [2007] EWCA Civ 1330. But it was acknowledged by same Home Secretary that it had been wrong to prevent Gurkhas from settling here with their families in the past. Mr Howells handed up the case of JB (India) [2009] EWCA Civ 234, in which Lord Justice Sullivan acknowledges that " where there is an interference with family life sufficient to engage Article 8(1), recognition that the family has been the victim of a 'historic injustice' may well be relevant, in some cases highly relevant, when the proportionality of the interference is considered under Article 8(2) ." In the present case, the long overdue recognition that Gurkhas should have had their service to this country rewarded by being allowed to settle here does reduce the weight to be put into the public interest side of the balance, even if not by very much. But the upshot is that the Article 8 balance comes down in the present case on the side of the appellant and her family in this country.

DECISION

17. The appeal is allowed under Article 8 of the ECHR.

Signed

Senior Immigration Judge McKee,

Judge of the Upper Tribunal