Upper Tribunal
(Immigration and Asylum Chamber)

CT (Gurkhas: policy) Nepal [2011] UKUT 53 (IAC)

THE IMMIGRATION ACTS

Heard at Newport (Columbus House) **Determination Promulgated**

On 7 September 2010

.....

Before

Mr C M G Ockelton, Vice President

Senior Immigration Judge Grubb

Between

CT

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr. C Howells , instructed by N. C. Brothers & Co. Solicitors

For the Respondent: Ms. T Powell, Home Officer Presenting Officer

1. The reformulation of policy in relation to family members of Gurkhas in June 2009 supersedes the statement made in the House of Commons on 29 April 2009.

2. The reformulated policy, as it applies to adult children, involves considering a number of relevant circumstances, and a consideration based only on the facts as they were at the date of an application a long time ago may not meet the needs of the case.

DETERMINATION AND REASONS

1.
The appellant is a national of Nepal. She appealed to the First-tier Tribunal against the decision of the respondent on 22 December 2009 refusing to grant her indefinite leave to remain in the United Kingdom. Immigration Judge Sharp dismissed her appeal. The appellant now has permission to appeal to the Upper Tribunal.

2.

The appellant's application was made as long ago as 3 October 2007. It was based on the claim that she was dependent on her father, formerly a Gurkha soldier in the British Army, and now present and settled in the United Kingdom. The appellant was in the United Kingdom, having arrived on a visitor's visa. She had a brother and a sister remaining in Nepal, and another sister in Hong Kong. Her mother lived and lives in the United Kingdom with her father. She is well-educated, with A-levels and subsequent qualifications in computer science. Her position is that she has always depended on her father for her needs.

3.
She came to the United Kingdom in order to take part in "Gurkha Justice Week". The Immigration Judge accepted that on her arrival she intended to return to Nepal. At the time her mother was still there as well has her brother and sister. There appears to be a family home, of considerable size.

4.
As we have already indicated, it was some two years and two months before the respondent made a decision on the appellant's application. There may well have been reasons for that: in particular, as is well known, there was litigation relating to the position of the families of former Gurkha solders, culminating in the decision of Blake J in Limbu and others v SSHD and others [2008] EWHC 2261 (Admin), and subsequent statements in Parliament.

5.
The letter of refusal in the present case includes the following observations:

"In view of the fact that your mother, brother and sister are in Nepal who you lived with prior to your arrival in the United Kingdom, the Secretary of State is not satisfied that you will be living alone outside the United Kingdom in the most exceptional circumstances and mainly dependent financially on relatives settled in the United Kingdom.

Therefore, you do not satisfy the requirements of the Immigration Rules for this category and it has been decided to refuse your application for indefinite leave to remain under paragraph 319 with reference to 317(i)(f) of HC 395 (as amended).

As it is considered that you do not meet the requirement of the Immigration Rules your application has been further considered outside the Immigration Rules and under revised discretionary criteria relating to Gurkhas dependents, but the Secretary of State is not satisfied that there are strong reasons to merit the exercise of discretion in your case.

You are over 18 and your application was based on the fact that your father is a former Gurkha soldier who is present and settled in the United Kingdom, the Secretary of State is not satisfied that the variation of leave that you sought is for a purpose that is covered by the Immigration Rules or that you qualify under discretionary criteria, and it has been decided to refuse your application under paragraph 322(1) on HC 395 (as amended)."

6.
The letter goes on to reach conclusions adverse to the appellant on Articles 3, 8 and 14 of the European Convention on Human Rights and to list a chronology.

7.
The appellant's appeal to the First-tier Tribunal was based on paragraph 317 of Statement of Changes in Immigration Rules , HC 395, the Gurkha policy, and Article 8. The Immigration Judge took into account oral and documentary evidence, which revealed amongst other things that the family

situation had changed somewhat since the application was made. He concluded that, even taking account of the family circumstances as they were at the time of the hearing before him, the appellant did not meet the requirements of paragraph 317. He went on to consider the application of the European Convention on Human Rights to her case and concluded that the refusal of the appellant's application, and her subsequent removal, would not infringe anybody's human rights.

8.
So far as issues arising under policies are concerned, he said this:

"69. It is not for me as part of this appeal to consider the discretion of the respondent in general terms or under the policy document. I must consider the appeal in relation to rule 317 of the Immigration Rules and under Article 8 of the ECHR. Many of the arguments put forward on behalf of the appellant in the skeleton argument and before me relate to the discretion of the respondent and are of limited significance to the issues that I must consider.

…

85. As to the policy in relation to the dependents of Gurkhas I have already mentioned that it is not for me to consider this. The case was adjourned from its earlier hearing to enable it to be considered. The respondent has therefore had the opportunity to do so and has concluded that the appellant does not come within the terms of the policy. This again may be disappointing for the appellant and her family. However, it is not a matter for me."

9.
The grounds of appeal to the Upper Tribunal challenge the Immigration Judge's conclusions on paragraph 317 and on Article 8, and with (if we may say so) rather greater merit submit that the Immigration Judge erred in his approach to policies. If the respondent failed to apply his own policy correctly, the decision would not be in accordance with the law. It was that aspect of the grounds that Mr Howells elaborated before us.

10.
Mr Howells made a number of distinct submissions.

11.
The first is that the appellant had a legitimate expectation that she would not be removed from the United Kingdom, because of a statement made in Parliament on 29 April 2009. We were shown the account of the relevant debate, Hansard (Commons), 29 April 2009, cols 988-993. The Immigration Minister is there reported as saying this:

"I made the position of my Right Hon. Friend the Home Secretary very clear: we cannot envisage circumstances in which people involved in the applications will be deported. In recognition of the debate this afternoon, I give again the commitment that we will not take action against people from the 1500 or so who do not meet the current guidelines until we have clarity on the new guidelines."

12.
The difficulty with Mr Howells' submission in relation to that statement is that, in the course of his other submissions, he relied on guidance for the treatment of such cases issued or updated in June 2009, that is to say after that debate. There is no room for doubt that the internal instructions to which we are about to refer constitute the "new guidelines" to which reference was made by the minister. It follows that the undertaking given in the debate was superseded by the issue of those new guidelines.

13.
Mr Howells' second submission related to the content and impact of the applicable guidance, and whether the Secretary of State had followed it. Some confusion was engendered by his original reference to guidance called "SET12: Former members of HM Forces and Families", last updated 25 June 2009, which had been said in his skeleton argument to be the applicable guidance. It is quite clear, however, that it is not: the opening words of that document as produced to us are as follows:

"This is internal guidance for use by Entry Clearance Staff in the handling of **settlement in the United Kingdom** applications made **outside** the United Kingdom. It is live document under constant review and is for information only."

14.
Thus, SET12 is the guidance applicable to applications from outside the United Kingdom, not applications from the United Kingdom like the appellant's. The guidance relevant to the appellant's application is Chapter 15, Section 2A of the Immigration Directorates' Instructions: the version applicable at the date of the decision in the present case appears to be that dated June 2009. The relevant provisions are in paragraph 11-13. Paragraph 11 adverts to the Immigration Rules relating to dependents of former service personnel (including discharged Gurkhas) which apply to spouses, civil partners, unmarried and same-sex partners, and child dependents. That paragraph ends with the following words:

"In addition to consideration under these provisions, applications for settlement from dependents should also be considered under the relevant provisions of the Immigration Rules – e.g. paragraph 281 (spouses and civil partners), paragraph 297 (children), paragraph 317 (parents, grandparents, other dependent relative) – before being considered under the discretionary arrangements set out below."

15.
Paragraph 12 relates to spouses, civil partners, unmarried and same-sex partners, and paragraph 13 deals with children. It begins with the provision relating to those who are still under 18, and then we find this:

"13.2 However, settlement applications from dependents over the age of 18 who are the children of serving foreign and Commonwealth HM Forces members (including Gurkhas) who meet the requirements of a parent should normally be approved, provided the dependant 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.

In exceptional circumstances discretion may be exercised in individual cases where the dependant is over the age of 18. In assessing whether settlement in the UK is appropriate consideration should be given to the following factors:

•
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;

•
the applicant has previously been granted limited leave as a dependant of a member of HM Forces

•
the applicant has been, and wishes to continue, pursuing a full time course of study in the UK.

•

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

•

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, discretion may be exercised and settlement granted in the UK."

16.

So far as the appellant is concerned, Mr Howells accepted that we are concerned with the passage beginning "in exceptional circumstances" listing the five bullet points and continuing below them. Those provisions envisage consideration by the Secretary of State, and exercise of discretion in exceptional circumstances. Mr Howells' primary submission was that where an individual falls within one or more of the categories identified in the bullet points, there is an expectation that the discretion will be exercised in his or her favour. If that is right, he submitted, the Tribunal should allow the appeal with a direction that the Secretary of State act accordingly, in accordance with the principles set out in AG and others [2007] UKAIT 82 at [50]:

"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. There will be no need to base such a decision on human rights grounds, because it is demanded by the more detailed provisions of the 2002 Act. 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."

17.

We are unable to see that the terms of paragraph 13.2 begin to fulfil the criteria there set out. The IDIs simply do not indicate any presumption that leave will be granted to adult children. They indicate merely that it may be granted in exceptional circumstances, following the consideration of criteria including those set out. We therefore reject Mr Howells' submission that this was a case in which the Immigration Judge should have allowed the appeal on the basis that the Secretary of State's guidance required a decision in the appellant's favour.

18.

Although the appellant fails in that sense however, that is not the end of the matter. It is clear that the guidance requires a consideration of an applicant's family members, and consideration also of what the applicant's position would be if living outside the United Kingdom. In this case, as perhaps in other Gurkha family cases, there was a delay between the application and the decision, during which the situation of the appellant's family members had changed. The appellant's mother came to the United Kingdom after she did, but by the time of the appellant's application was already settled in the United Kingdom as the spouse of a former Gurkha. In the period after the appellant's application but before the decision, one of the appellant's sisters came to the United Kingdom and her brother also

sought to undertake studies here. It is now said to be the case that if the appellant returns to Nepal she will be living alone.

19.
It is not suggested on the Secretary of State's behalf that anything was done to ensure that the information given in making the application was still current at the date of the decision. Ms Powell, on behalf of the Secretary of State, did not seek to defend the Secretary of State's decision from our suggestion that it was defective for this reason. As it happens, the changes in the appellant's family members' situations are changes of which the Secretary of State has notice, because they have resulted from immigration applications: but, in any event, it cannot be right to make a decision requiring consideration of current circumstances, solely on the basis of the facts as they were over two years previously.

20.
For that reason only we have concluded that the Secretary of State's decision failed properly to apply the appropriate policy guidance. The Immigration Judge should have appreciated that, to that extent, he was concerned with the guidance and its application. He erred in law in failing to take it into account.

21.
We re-make the decision. We allow the appellant's appeal on the ground that the decision against which she appeals was one not in accordance with the law. She therefore awaits a lawful decision on her application of October 2007.

Signed

C M G OCKELTON

Vice President of the Upper Tribunal,

Immigration and Asylum Chamber