Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number
IA/37765/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10th July 2014
Prepared 15th July 2014

Determination Promulgated
On 16th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

SATISH DAMAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr C Howells (Counsel instructed by N C Brothers & Co, Solicitors)
For the Respondent: Ms L Kenny (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a national of Nepal and entered the UK as student in January 2008. His mother came to the UK with ILR on the 15th of March 2012. Since then they have lived together and it was accepted by the Secretary of State that they had re-established family life together in the UK. The Appellant applied for entry as the dependent under the policy relating to Foreign and Commonwealth HM Forces.

2. The Secretary of State rejected the application deciding that the Appellant was not dependent on his mother and that he had not shown more than the usual emotional ties. The case was considered on the basis of submissions, the evidence was accepted. The appeal was allowed with the Judge finding that had he been allowed to the Appellant's father would have settled in the UK on retirement from the British army. That would carry significant weight and there were no negative considerations so far as the Appellant's immigration history was concerned.

3. In seeking permission to appeal to the Upper Tribunal the Secretary of State submitted that the Judge had misdirected itself in law. That a Gurkha would have settled in the UK at a time when his now adult child could have joined him was a strong but not determinative factor. The Judge

had not paid sufficient regard to the factors raised by the Secretary of State relating to the time he had lived apart from his mother, had family in Nepal who could assist him and was dependent on his mother by virtue of his visa. Permission was granted by First-tier Tribunal Judge Grimmettt on the 13th of May 2014.

4. The submissions are set out in the Record of Proceedings and it is not proposed to repeat them here. In summary for the Secretary of State it was submitted that there was nothing exceptional about the Appellant's circumstances and reliance was placed on Ghishing (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC). For the Appellant it was submitted that the appeal was unfocussed and the findings made had not been challenged and amounted to an argument that the article 8 findings were unreasonable, reliance was placed on Ghishing and others (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 000567 (IAC). The second Ghishing case came about following the case of R (Gurung) v Home Secretary (CA) [2013] 1 WLR 2546.

5. It is clear from Ghishing [2013] that where it is found that article 8 is engaged, a finding in this appeal not challenged by the Secretary of State, and but for the historic wrong the Appellant would have settled in the UK long ago, another finding not challenged by the Secretary of State, that would normally determine the outcome of the article 8 proportionality assessment in the Appellant's favour. If the Secretary of State can point to negative factors over and above the public interest in maintaining immigration control they would be given appropriate weight, a bad immigration history or criminal record could outweigh “the powerful factors bearing on the Appellant's side of the balance.”

6. Although the time scales were different the Appellant in the Ghishing case had come as a student and was followed by his parents some years later. Clearly arrival in that order is not a bar to success under the policy if article 8 is engaged on the basis of the family life that is then established and the other conditions are met.

7. In short the submissions of the Secretary of State amount to a disagreement with findings properly made and open to the Judge on the undisputed facts of the case. Applying the rationale in the cases cited above it is clear that the Judge was entitled to make the findings set out and to reach the conclusion that applying the cases and policy to the facts the Appellant succeeded. The determination properly read contains no error of law.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

The fee award made by the First-tier Tribunal remains.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 16th July 2014