Neutral Citation Number: [2017] EWCA Civ 2106

Case No: C5/2015/3694

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION & ASYLUM CHAMBER)
DEPUTY UPPER TRIBUNAL JUDGES RIMINGTON AND O'RYAN

Royal Courts of Justice
Strand, London, WC2A 2LL
13/12/2017

B e f o r e :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE HAMBLEN
and
THE RIGHT HONOURABLE LORD JUSTICE NEWEY

Between:

GANESH PUN (NEPAL) AND ANR **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

Mr Raphael Jesurum (instructed by Howe & Co) for the Appellant
Mr John Jolliffe (instructed by Government Legal Department) for the Respondent

Hearing date: 28th November 2017

HTML VERSION OF JUDGMENT APPROVED

This is the judgment of the court:

Introduction

1. Mr Ganesh Pun and Mrs Jyoti Pun, both citizens of Nepal, were married in Nepal in 2005. They have a son who is still in Nepal. Mr Pun's father was a Gurkha from 1968 to the date of his discharge from Gurkha service on 18th March 1989. He came to the United Kingdom in 2009. He has indefinite leave to remain as part of the policy of redressing the historic injustice whereby, but for previous immigration rules, Gurkhas would have been permitted to settle in this country. The policy was addressed in Gurung v Secretary of State for the Home Department [2013] 1 WLR 2546 where it was held that, when considering those, who still (at the time of application) enjoyed family life with Gurkha parents and who would have been granted leave to remain with such parent at the time when such Gurkhas ought to have been permitted to settle in this country, the Secretary of State should take account of the historic injustice caused to Gurkhas, when deciding if such family members were entitled to leave to remain.

2. Mrs Pun (born 22nd November 1987) arrived in the United Kingdom on 27th October 2010 with leave to enter as a Tier 4 (General) Student until 30th April 2013. Mr Ril Pun stood as her sponsor but she

came on the basis of being a student not as part of any family re-union; Mr Ril Pun paid £3,500 for the first year of Mrs Pun's academic course but subsequent fees were paid by Mrs Pun from her own resources or those of her husband.

3. Mr Pun (born 10th February 1977) arrived in the United Kingdom on 28th May 2011 as the spouse of Mrs Pun; he also had leave to enter until 30th April 2013. He did not apply for leave to enter as a family member of his Gurkha father but only as Mrs Pun's spouse. On his arrival he and his wife moved in with Mr Ril Pun. On 11th April 2013 they both applied for indefinite leave to remain as adult dependent relatives of Mr Ril Pun. In December 2014 they had a second child.

4. The Secretary of State refused their applications on the basis that they were not dependent on Mr Ril Pun and they had their family life with each other and their children not with him. It was accepted that they each had a private life in the United Kingdom but that was insufficient to enable them to have the benefit of any Gurkha policy and there were no circumstances justifying the grant of indefinite leave to remain.

5. They appealed this decision and on 28th September 2014 Judge Youngerwood of the First Tier Tribunal allowed their appeal. He found that there was no family life with Mr Ril Pun but that their established private life enabled them to rely on the historic injustice suffered by the Gurkhas as the critical factor to be weighed in the proportionality balancing exercise in determining whether they should have indefinite leave to remain. He purported to follow the decision in Gurung.

6. The Secretary of State appealed to the Upper Tribunal which decided that Judge Youngerwood had erred in law on the basis that it was necessary for the applicants to establish a family life before they could rely on Gurung and mere private life was insufficient for that purpose. Judge Rimington of the Upper Tribunal agreed, set aside the decision of the First Tier Tribunal. At a later date, the Upper Tribunal (Deputy Judges Rimington and O'Ryan) heard oral evidence from the applicants and Mr Ril Pun. The Upper Tribunal agreed with the FTT that that evidence did not establish family life and held that private life was insufficient for the purpose of relying on the policy of redressing the historic injustice shown to Gurkhas. They proceeded to hold that Mr and Mrs Pun's private life would not be so seriously prejudiced by return to Nepal as to constitute a breach of Article 8 of the ECHR and upheld the Secretary of State's original decision.

7. The essence of their decision was that the policy approved in Gurung only applied to dependent adult children which they justified by saying (para 44):-

> "… the discretionary policy, which attempt[s] to set out redress for historic injustice, refers to 'dependents' and is not applicable to circumstances where no such dependency and only private life is engaged. The policies do not refer to a married couple or group of individuals who have come to the UK on a completely separate basis – in this instance as a Tier 4 dependant under the Points Based System. It is Gurkhas and their dependents and adult dependent children who were to be given the advantage of the relevant policy. In effect it is being requested in this appeal, that the principle also be extended to non-dependent dependents (the appellants' children). The fact that private life is being relied on is indicative in itself that the link between the appellants and the sponsor has indeed been broken for the purposes of historic injustice."

The Upper Tribunal went on to say that even if the policy applied to those with a private life, it should be given for less weight than it would have for family life. They considered Section 117B of the Nationality Immigration and Asylum Act 2002 and, as indicated above, concluded that the private life of Mr and Mrs Pun would not be so seriously prejudiced as to amount to a breach of Article 8.

8. Mr and Mrs Pun now appeal to this court with the permission of Sales LJ who said:-

> "7. In the two appeals which were actually determined in the Gurung case, the appeals of NL and SL (see paragraphs [47] and following), what was addressed was an application by adult children for leave to enter the United Kingdom. The appeals of NL and SL were

dismissed. Essentially there was no article 8(1) peg available to them in relation to which the historic injustice principle could apply to affect the proportionality exercise.

8. The position in relation to the applicants in the present case is that they have, by another route, come to the United Kingdom and have since established a private life here with the first applicant's father and mother. They therefore do have a peg under article 8(1) based upon right to respect for their private life, as distinct from right to respect for family life."

The Historic Injustice

9. Veterans of the Brigade of Gurkhas discharged before 1997 were denied any opportunity to apply for settlement until 2004. This was found to be a historic injustice in R (Limbu) v SSHD [2008] EWHC 2261 (Admin) – see §68(i), and confirmed in R (Gurung).

10. The policy originally announced in 2004 acknowledged the debt owed to servicemen and their families: see ministerial statement in R (Limbu) at paragraph 12. However, the policy which attempted to correct the injustice to veterans (DSP 29.4) was found irrationally restrictive in the factors to which it purported to have regard (failing, for example to take into account length of service or particularly meritorious conduct, and emphasising ties to the UK which Gurkhas were inherently unlikely to acquire).

11. A second policy introduced in 2009 (and announced by the Secretary of State as being intended to correct the injustice) provided that wives and minor children would be granted indefinite leave to remain in line with the Sponsor. It was this policy which was considered in Gurung. The court rejected challenges to the lawfulness of the policy and held that, where there was a dependency, the historic injustice should have substantial weight when applications of adult dependent children to remain came to be considered.

12. Rather surprisingly, although both counsel agreed that it was the 2009 policy which applied to this case, neither counsel could provide a copy of it. It was nevertheless agreed between counsel that the terms of the 2009 policy were, for the purposes of this appeal, relevantly the same as those contained in a policy of December 2012 a copy of which Mr Joliffe for the Secretary of State was able to provide.

13. This policy deals with persons in Her Majesty's Forces seeking settlement in Chapter 15 section 2A. Paragraph 2 provides for Gurkhas discharged on or after 1st July 1997 and refers the reader to Annex A for discretionary arrangements for former Gurkhas (such as Mr Ril Pun) discharged before 1st July 1997. Paragraph 13.2 has a provision applying to HM Forces in general relating to "dependents over the age of 18". That provides that such dependents would normally need to qualify for settlement in the UK under a specific provision of the Immigration Rules but discretion can be exercised "in exceptional circumstances". Annex A (which bears the date 2010) provides that settlement applications by a Gurkha discharged before 1st July 1997 will normally be approved provided that he had served at least 4 years and that discretion will likewise be normally exercised to grant settlement to spouses and dependent children under the age of 18. It goes on:-

"Children over the age of 18 and other dependent relatives will not normally qualify for the exercise of discretion in line with the main applicant and would be expected to qualify for leave to enter or remain in the UK under the relevant provisions of the Immigration Rules, for example under paragraph 317, or under the provisions of Article 8 of the Human Rights Act. Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see Section 13.2."

This provision does not apply to non-dependent children who must therefore be all the more required to qualify under the relevant Immigration Rules or Article 8 or (perhaps) exceptionally outside the Rules.

Submissions

14. Mr Jesurum for the appellants submitted:-

i) there was no error of law made by the First Tier Tribunal because no distinction can be drawn between family life and private life. FTT Judge Youngerwood's conclusion that the appellants enjoyed private life together in the United Kingdom (as opposed to family life with Mr Ril Pun) did not mean that the historic injustice to Mr Ril Pun should not be given the same great weight (indeed almost conclusive weight) in his favour when considering the appellant's application for settlement, as the weight given in cases of dependent children under 18;

ii) recent authority supported the proposition that there should be no consequential difference between family life and private life for the purpose of considering applications for settlement indefinite leave to remain;

iii) the right approach is for the judge to ask whether, but for the historic injustice of refusing settlement applications for Gurkhas discharged before July 1997, any children would have been allowed to settle as children dependent on their Gurkha father. Mr Pun would have been 12 in March 1989 and would inevitably then have been allowed to settle as a dependent child;

iv) alternatively as someone married to a student who had leave to enter he had, as Sales LJ said was arguable, a peg under article 8 of the ECHR which could itself attract the benefit of the historic injustice principle;

v) the Upper Tribunal should not, therefore, have set aside Judge Youngerwood's decision; and

vi) alternatively, if there was any error of law in the FTT's decision, the above considerations should have been taken into consideration by the Upper Tribunal which had itself erred in law. Their decision should therefore be set aside and the Secretary of State be invited to consider the matter afresh.

15. Mr Jolliffe for the Secretary of State submitted that:-

i) the Upper Tribunal rightly held that there was an error of law in the FTT decision because the FTT had relied on the later decision of Ghising [2013] UKUT 567 to hold that the appeal should be determined in the appellants' favour without appreciating that Ghising (like Gurung) was considering the case of a dependent child having family life with his Gurkha father;

ii) the policy of 2009 did not apply to non-dependent children and the historic injustice could not therefore carry any (alternatively little) weight in such cases;

iii) the critical question was whether there was dependency at the time of the application; it did not greatly matter whether such dependency carried with it the label of family life or private life; no doubt if there was dependency it would count as family life and, if it was found that there was no family life, it would follow that there was no dependency; and

iv) on the basis that the Upper Tribunal was correct to find that the FTT had made an error of law, the Upper Tribunal's determination could not be criticised.

FTT error of law?

16. The First Tier Tribunal found (para 15) that there was no family life for the purpose of Article 8 and that there was no dependency. It then held (para 16) that there was private life because the appellants had together been living with Mr Ril Pun for some years. It then, on the authority of Ghising, decided that the historic injustice of the Gurkhas' position should carry the carry the day because there were "absolutely no countervailing factors". The FTT gave no consideration to the factor that the appellants were non- dependent adults or to the question whether that factor should reduce the weight given to the historic injustice caused to Mr Ril Pun. Both Gurung and Ghising were considering the weight to be given to the historic injustice in relation to dependent children. To hold that Ghising decided the case in the appellants' favour once they had shown they had a private life without appreciating that the appellants (as non-dependents) were in a very different position from the appellant in Ghising is, with

respect, an error of law. It follows that the Upper Tribunal was right to set the decision aside, unless Mr Jesurum's other arguments are correct.

No difference between family life and private life?

17. Mr Jesurum relied on AA v United Kingdom [2011] ECHR 8000/08 and [2012] Imm AR 1 in which it had been held that a foreign criminal who had received a four year sentence for rape aged 20 had no family life in the United Kingdom. Although he lived with his mother at his permanent residence, he was at university and lived with friends during term time. He did, however, have a private life because he was close to his family and attended church as well as university. This court had refused him permission to appeal from the Asylum and Immigration Tribunal's dismissal of his appeal against deportation. But the Home Office made no attempt to deport him for three and a half years after his appeal had been dismissed during which he had completed his degree and obtained stable employment. The European Court of Human Rights decided that deportation had become disproportionate and would violate Article 8 of the Convention. In the course of its judgment it said:-

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as art 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of art 8. Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an inference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, paras 57-60)."

18. This authority was followed in Singh v SSHD [2015] EWCA Civ 630 where entry visas had expired and this court had to consider whether a refusal of further leave was contrary to Article 8; Sir Stanley Burnton said:-

> "However, the debate as to the whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, in agreement with Sullivan LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in AA, in a judgment which I have found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the appellant's private life rather than their family and private life. In my judgment, she took all relevant factors into account, and her conclusion on proportionality is not open to challenge. Indeed, I would go further. In my judgment, no reasonable Tribunal, on the facts found, could properly have come to a different conclusion."

19. No doubt those authorities are relevant and should be followed in what one may call the generality of Article 8 cases. But the present case is not such a case because the question is whether in the Article 8 analysis great (indeed almost conclusive) weight should be given to the historic injustice committed towards Gurkhas. That cannot be considered in isolation from the policy that has been put in place to remedy that injustice. That policy expressly says that dependent adult children can only be regarded as candidates for settlement within the Immigration Rules or in exceptional circumstances. The fact that

dependent children under 18 can rely on the historic injustice does not mean that independent children over 18 can rely on it in the same way.

20. The critical feature for the right to rely on the historic injustice is dependency. Whether one categorises any particular candidate for dependency as having a family life or a private life may well be "arid and academic" but the question of dependency is vital. Both the FTT and the Upper Tribunal (paras 14-15 and 36 respectively) have found that there is no dependency and that, to our mind, prevents the historic injustice from having the same considerable weight as it must have for adults dependent on their parents at the time when the application is made.

21. Otherwise all children of Gurkhas would be strong candidates for settlement regardless of their tie with their parents. It would, indeed, be difficult to say why grandchildren should not also have the right to settle. Mr Jesurum sought to draw a distinction between private life where there are "bonds of practical support" between a Gurkha father and his adult child on the one hand and a purely private life on the other. But drawing a distinction between different kinds of private life would be as "arid and academic" as drawing a distinction between family and private life in the first place.

"But for" test of causation

22. Mr Jesurum relied on Patel v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17 for the proposition that, if Mr Pun's father had been granted indefinite leave to remain when he should have been in March 1989, Mr Pun would have also obtained that right as a member of the family of his father. He submitted that, but for the historic injustice imposed on the Gurkhas he would therefore have been in the United Kingdom and should now be entitled to remain. The historic injustice in Patelwas that certain persons (especially in India) who were citizens of the United Kingdom and colonies had their rights restricted by the Commonwealth Immigration Act 1968, which was later held to be racially discriminatory. The injustice was righted by section 12 of the Nationality Immigration and Asylum Act 2012 which entitled British overseas citizens who held no nationality other than that of the United Kingdom and colonies and had not renounced any other nationality to be registered as British citizens. A number of Indians took advantage of these provisions and the question then arose as to whether their children should also be entitled to be registered as British citizens. Sedley LJ (with whom Longmore and Aikens LJJ agreed) said:-

> "… Appellants – the present ones included – are typically children who, but for their parents' legal inability to settle here between 1968 and 2002, would have either been born here or have come as minors in right of their parents.
>
> 14. You can set out to compensate for a historic wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – may still have a family life with parents who are now settled here not by leave or by force of circumstances but by long-delayed right. That is what gives the historical wrong a potential relevance to art 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of art 8(2).
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> 15. As the individual cases to which I now turn illustrate, the effect of this is to reverse the usual balance of art 8 issues. By the time they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizen ship. If so, the threshold of art 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of art 8(1), the balance of factors determining proportionality for the purposes of art 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in NH (India), the family would or might have settled here long ago."

23. For the court in Patel the existence of family life (and indeed dependency) at the time of application to the Entry Clearance Officer was critical because without it Article 8 would "have no purchase". We do not read the decision in that case as mandating that the correction of the historic injustice in that case (or in the Gurkha cases) requires those, who have no dependency at the time of application, to be registered as British citizens or be entitled to permanent settlement. The same applies to the case of Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 on which Mr Jesurum also relied where the critical question (see paragraph 42) was whether the appellant's family life with his parents subsisted at the time his parents left Nepal to settle in the United Kingdom and was still subsisting at the time of the Upper Tribunal's decision. The Upper Tribunal had not addressed that question in that case but it has been addressed both by the First Tier Tribunal and the Upper Tribunal in this case and answered against the appellants.

Is marriage to a student a peg on which to rely for purposes of Article 8?

24. If it is right that the 2009 policy has no application to non-dependent children over 18 and that the need to right the historic wrong done to Gurkhas cannot be treated as almost conclusive for adult non-dependent children as it was for dependent children over 18 in Gurung, we do not think the decision of the First Tier Tribunal can be treated as correct in law merely because there may be another peg on which the applicant can mount a claim to the protection of Article 8. The suggested "peg" is marriage to a student with limited leave expiring in April 2013. While the need to right the historic wrong may be a legitimate consideration in a general way, it cannot lead to an inevitable decision that the appellant has a right to settle in the United Kingdom. The question of the "peg", as Sales LJ described it, is therefore more appropriately addressed when the remade decision of the Upper Tribunal is considered.

25. For these reasons Mr Jesurum's submission that the Upper Tribunal erred in law in finding an error of law in the FTT's decision has to be rejected.

The Upper Tribunal determination

26. The Upper Tribunal correctly concentrated on the question whether the first appellant, aged 38 and in good health, could be said to be dependent on his father. They concluded (para 28) that there was no emotional dependence and (paras 29 and 36) that there was no financial or economic dependency. It was for that reason that they held there was no family life. They accepted (para 38) there was private life which might attract the protection of Article 8. Those are essentially factual conclusions which disclose no error of law. They pointed out that previous authority had required there to be dependency/family life for the historic injustice policy to apply and in para 44 set out the justification (already set out in para 7 above) for saying that the connection of the historic wrong did not apply to those who could only claim private life.

27. We would not ourselves subscribe to the apparent view of the Upper Tribunal that the need for correction of the historic wrong done to Gurkhas can never be relevant for those who have a private life in the United Kingdom since one can envisage cases in which it might be relevant in a general way when a tribunal considers a claim under the Immigration Rules or, exceptionally, outside them. But this does not greatly matter since the Upper Tribunal went on to say (para 47) that, even if historic injustice does apply to private life, it would be afforded far less weight than it would in cases of dependency. With that view of the law, we do agree.

28. It is, at this point, that the question of the first appellant's "peg" of marriage to a student with limited leave to enter becomes relevant. But if the Upper Tribunal is right to emphasise the limited weight to be given to the historic injustice in cases where there is no dependency, the fact that there is the "peg" cannot avail Mr Pun to any great extent.

29. The Upper Tribunal were well aware of the existence of Mr Pun's marriage and that he and his wife lived with his father and mother. Giving the need for correction of the historic injustice "far less weight" than in cases of proved dependency, they concluded that the need for effective immigration controls "out-weighs the weight to be afforded to that of the appellants" and they were not persuaded that the appellants' private life would be seriously prejudiced sufficiently to amount to a breach of Article 8. In coming to that conclusion it comprehensively considered the interests of the appellants'

child born in the United Kingdom. It also applied section 117B of the Nationality Immigration and Asylum Act 2002 and found as a fact not only that Mr Pun could not speak English and Mrs Pun could only speak it haltingly but also that their private life was formed when their status was known by both of them to be precarious.

30. Mr Jesurum submitted that the Upper Tribunal should have given weight to Mr Ril Pun's particular circumstances such as his length of service, the fact that he was only given leave every three years, his Long Service and Good Conduct Medals and the long wait before his injustice was corrected. These considerations apply to many Gurkhas and it would be wrong to assume the Upper Tribunal was unaware of them. But its task was to consider Mr and Mrs Pun's applications not any application relating to Mr Ril Pun, whose particular circumstances could have at best only marginal application to the claims advanced by the appellants.

Conclusion

31. We can detect no error of law in the Upper Tribunal's determination and would, therefore, dismiss this appeal.