IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/25078/2012
OA/25077/2012
OA/25076/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 July, 4 September and 6 November 2014	**On 14 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

NAR SABHA GURUNG
DHAN SUBA GURUNG
MANRAJ GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants:	on 22 July: None, on 4 September: Ms Wason of Bobbie Wason Human Rights as a McKenzie Friend and on 6 November: None
For the Respondent:	on 22 July: Ms A Everett, on 4 September: Mr N Bramble and on 6 November: Ms J Isherwood, all of the Specialist Appeals Team

DECISION AND REASONS

The Appellants

1. The Appellants are two sisters and a brother born respectively on 30 September 1987, 29 June 1988 and 1 October 1990: each is a citizen of Nepal. They are the children of the late Damar Bahadur Gurung who retired from the Brigade of Gurkhas as a sergeant on 6 September 1976 after almost sixteen years' service. On 7 October 1999 he died in Hong Kong. The Appellants are the children of his second marriage, to Madhu Maya, celebrated in Nepal some five years after his discharge.

2. On 12 June 2010 the Appellants' mother arrived with leave to enter for settlement issued pursuant to the Respondent's concession to the widows of retired Gurkhas. She was joined in early 2011 by her youngest child Meena Gurung, born on 2 September 1993, who had leave to enter for settlement. The Appellants sought entry clearance for settlement to join their mother and younger sister.

The Decision and Appeal

3. On 6 November 2012 the Respondent refused the application of each Appellant on a similar basis. He referred to the discretionary arrangements for the widows of former Gurkhas set out in chapter 15 Section 2A Annex B of the Immigration Directorate Instructions (IDI). He noted the immigration history of the Appellants' mother who is their Sponsor and their youngest sister. The discretionary arrangements referred to in the IDI did not extend to the adult children of the widows of deceased Gurkhas. Consequently the Respondent had considered the applications solely under paragraph 317 of the Immigration Rules.

4. The Respondent found the Appellants had other siblings, uncles and a maternal grandmother in Nepal. None of the Appellants suffered from any medical condition or disability and they lived in the family home in Nepal. The Respondent refused the application because the Appellants were not living alone outside the United Kingdom in the most exceptional compassionate circumstances as required by paragraph 317(i)(f) of the Immigration Rules.

5. The Respondent looked at the accommodation available to the Sponsor. He noted it was a three bedroomed property already occupied by the Sponsor and her youngest daughter. He concluded the Appellants would not be adequately accommodated without recourse to public funds and so refused the applications additionally under paragraph 317(iv) of the Immigration Rules.

6. The Respondent considered the limited financial evidence upon which the Appellants based their claim that they were financially wholly or mainly dependent on their mother and decided that the evidence was insufficient to show that they were financially wholly or mainly dependent upon her as required by paragraph 317(iii). He further considered the evidence of the Sponsor's income and on the evidence provided together with the amount of monthly rent paid concluded the Appellants could not or would not be maintained adequately without recourse to additional public funds as required by paragraph 317(iv)(a) of the Immigration Rules.

7. Finally, he noted the Sponsor had chosen to apply for settlement in the United Kingdom when the Appellants were adult and that all of them lived together and had other family in Nepal. Family life between their mother and themselves as adult children could satisfactorily be continued by visits and in the same manner as prior to the refusal of the Appellants' applications.

8. On 5 December 2012 each of the Appellants lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are generic and formulaic.

The First-tier Tribunal's Determination

9. By a determination promulgated on 9 May 2014 Judge of the First-tier Tribunal Walters dismissed the appeal of each Appellant under the Immigration Rules and on human rights grounds. At paragraph 8 of his determination he referred to a letter from money transfer agents stating that the Sponsor had sent thirteen separate amounts to the Appellants between 10 November 2011 and 19 November 2011. He did not consider such evidence satisfactory. At paragraph 12 he expressed some concern about the limited evidence of the Sponsor's earnings and the lack of evidence of any earnings by the Sponsor's youngest daughter who lived with her. He went on to dismiss the appeals on all grounds.

10. The Appellants sought permission to appeal and on 2 June 2014 Designated Judge of the First-tier Tribunal Zucker granted permission to appeal on the basis it was arguable the Judge's assessment of any family life had been overly focussed on whether remittances had been sent by the Sponsor to the Appellants rather than any holistic view. Further, it was arguable the Judge's explanation was too brief so that it was arguable that it was inadequately reasoned.

The July Upper Tribunal Hearing

11. Notice of the time, date and place set for the hearing had been properly given to each of the Appellants and their then solicitors. Late on 14 July the clerk to the Counsel instructed for the Appellants wrote to the Tribunal advising that the Counsel had two cases to be heard at Field House on 22 July, being the date set for the hearing of these appeals.

12. On 16 July the Appellants' solicitors had submitted bundles for the Appellants and on 18 July they had written to the Upper Tribunal to advise they were no longer acting but nevertheless the Appellants wished to continue with their appeal.

13. At about 10.30am Ms Ward, Counsel instructed by the erstwhile solicitors for the Appellants, informed the Tribunal that her instructing solicitors were no longer instructed by the Appellants. Neither the Sponsor nor anyone else had appeared for the Appellants and no message had been left with reception at Field House. Searches of the public areas of Field House had not disclosed the Sponsor or any representative, other than Ms Ward.

14. Ms Everett checked her papers and I checked mine to see if there was a telephone number for the Sponsor but neither of us could find one.

15. I have considered the documents in the Tribunal file and the issues raised. Having regard to the over-riding objective to deal with cases fairly and justly contained in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended and being satisfied that the Appellants and their Sponsor had been notified of the date, time and place of the hearing and that it was in the interests of justice of proceed, I decided to proceed with the hearing, at least so far as a consideration of whether the First-tier Tribunal's determination contained an error of law.

Error of Law Consideration

16. Ms Everett for the Respondent noted the Respondent had not filed any response in accordance with Rule 24 of the Procedure Rules. She submitted that on the evidence before him, the Judge had been fully entitled to reach the conclusions he did and that no Tribunal re-hearing the appeals would come to any different conclusion.

Consideration

17. I noted the Judge's determination made no reference to any of the extensive case law or Home Office policies relating to the grant of entry clearance for settlement to former Gurkhas, their wives and adult children. There was no reference to the State's acknowledgment of the historic injustice done to former Gurkhas and to their families.

18. The Judge's consideration of the Appellants' claim under Article 8 of the European Convention outside the Immigration Rules contained no reference to any of the recent extensive jurisprudence on this. The Judge found that family life did not exist between the Appellants in Nepal and their mother and younger sister in the United Kingdom, a finding which runs counter to the learning in *AG (Eritrea) v SSHD [2007] EWCA Civ 801* in which it was held there is a low threshold for the establishment of family life. In the light of these authorities, it was incumbent upon the Judge to proceed to a full consideration of the Appellants' claim under Article 8 following the five step process described in *R (oao Razgar) v SSHD [2004] UKHL 27*. For these reasons which are referred to in the grounds for appeal to the Upper Tribunal, I find the First-tier Tribunal's determination contained an error of law such that it should be set aside and the matter heard afresh.

19. In view of the fact that the Appellants had only very recently ceased to instruct their solicitors I considered it would not be just to proceed to re-determine the appeals and arranged for them to be heard before me at Field House at 10am on Thursday 4 September 2014.

20. At about 3.15 that afternoon the Sponsor together with her youngest daughter, a friend of the daughter and a gentleman described as an uncle arrived. The appeal had been listed for 10am. They explained they had experienced difficulties in travelling to Field House. With the agreement of Ms Everett for the Respondent I

explained to them what had happened in the morning and that the appeals would be re-heard on 4 September.

The September Hearing

21. The Sponsor and the Appellant's youngest sister together with a person who stated he was the Sponsor's brother-in-law attended. Ms Wason was also present as a McKenzie Friend. I explained the procedure I would adopt as the Appellants now had a McKenzie Friend.

22. The Sponsor started to give oral testimony but explained she was illiterate and even if someone had read to her the three decisions of the Respondent under appeal she would have soon forgotten the details. It was agreed the Sponsor's daughter should give oral testimony. She confirmed that the Respondent's decisions to refuse her siblings entry clearance had been explained to her. She had four siblings of the full blood. The Appellants had an older brother Min Bahadur Gurung who lived in Nepal.

23. At this point Mr Bramble commented Ms Wason had not seen the Respondent's previous decision granting entry clearance to the witness and there were other issues which needed to be addressed. These included evidence relating to the various transfers of money to the Appellants. The money agents had referred to transfers made prior to the decisions under appeal but there were no further details of such transfers and the bank statements submitted did not suggest appropriate withdrawals made to fund the transfers. The Sponsor's tenancy agreement indicated her accommodation comprised three rooms in addition to the usual offices but there was nothing to show that the accommodation was suitable for five adults. The Appellants' father had been discharged from the army long before his marriage to their mother and this needed to be considered in relation to the aspect of the historic injustice suffered by the Gurkhas. It was evident the Sponsor was illiterate and the McKenzie Friend needed to time to consider the documents and give advice in good time and not in the course of the hearing. Ms Wason said that given time she might be able to secure pro bono legal representation for the Appellants. Following a short discussion during which I checked that Ms Wason had now been supplied with the relevant documents, and Mr Bramble said that he would speak outside the hearing room with Ms Wason, it was agreed the hearing should be adjourned and that no further directions were required.

The November Hearing

24. The hearing was set to be resumed at Field House at 1400 hours on 6 November. By 1415 hours neither the Sponsor nor her youngest daughter nor any representative or McKenzie Friend had appeared. Searches of the reception area at Field House did not disclose any of them and no message had been received at the reception desk. I was satisfied that notice of the time, date and place set for the hearing had been properly given to the Appellants and their McKenzie Friend at the relevant address which Ms Isherwood confirmed was the same as that in the Respondent's records

and I checked was the same as had been given to the Tribunal at the September hearing. In all the circumstances and in particular in the light of what had happened at the two previous hearings, I was satisfied it would be just to proceed with the hearing in the absence of the Sponsor and any representative or McKenzie Friend for the Appellants. There was no communication on the Tribunal file from the Appellants, their Sponsor or any McKenzie Friend or legal representative subsequent to the September hearing.

25. For the Respondent Ms Isherwood relied on the determination in *Ghising and Others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567 (IAC)*. She relied in particular on paragraph 60 which states:

> Once this point is grasped, it can immediately be appreciated that there may be cases where Appellants in Gurkha cases will not succeed, even though their family life engages Article 8(1) and the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here on completion of his military service. If the Respondent can point to matters over and above the "public interest in maintaining of a firm immigration policy", which argue in favour of removal or the refusal of leave to enter, these must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour *may* still be sufficient to outweigh the powerful factors bearing on the Appellant's side. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a "trump card", in the sense that not every application by such a person will inevitably succeed. But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour.

The Respondent had also noted that the Appellants had not disclosed the existence of their half-siblings in Nepal.

26. Ms Isherwood continued there was no evidence before the Tribunal to show the intention of the Appellants' father to have settled in the United Kingdom, had he been permitted to do so. The Appellants had not supplied any statement or further documentary evidence to show they would be adequately maintained and accommodated. They had not sought to explain the dates and considerably varying amounts of the money transfers or the substantial gaps of time between some of them.

27. Issues which had been raised in the First-tier Tribunal's determination such as the lack of evidence of the youngest sister's employment at the date of the decision had not been addressed. By the date of the First-tier Tribunal hearing the sister had a different job. The schedule of money transfers was insufficient to establish dependency in any meaningful sense. The Appellants had failed to give a true picture of their situation in Nepal.

28. The Appellants generally had failed to address the issues raised by the appeal of which they had ample and full notice. The evidence given by the Appellants at their respective interviews produced inconsistent replies. Generally the Appellants had

failed to supply evidence to address the issues in the appeal. The burden of proof to the civil standard, that is the balance of probabilities, was on the Appellants. There was no explanation for the failure of the Sponsor or anyone else to appear for the Appellants. It was not disproportionate to the need to maintain proper immigration control to refuse entry clearance to the Appellants. The appeals should therefore be dismissed.

Consideration and Findings

29. The Appellants have shown that there would be adequate accommodation for them as evidenced by the letter of 2 March 2012 from Shepway District Council in the Appellants' bundle.

30. The evidence is that the Appellant's first wife eloped: see the letter of 13 July 2009 from the Records Office of the British Gurkhas, Pokhara. The letter shows the children of that marriage were born in 1970, 1971, 1972 and 1974. There was no other evidence about the children of the first marriage of the Appellants' father or their relationships, if any whether past or present, to the Appellants or the Sponsor and no explanation for the lack of such evidence. The youngest of the children of this first marriage would have been aged about 6 or 7 at the time of the Sponsor's marriage to the Appellants' father. Such evidence might have gone some way to explaining why when the Appellants were asked at interview about their family in Nepal they failed to make any mention of their half-siblings. Each of them mentioned two paternal uncles but stated they had no knowledge of their whereabouts. They added that the Sponsor's mother remains in Nepal. There is no reference in the Sponsor's statement to her mother or how she manages in Nepal.

31. In her statement the Sponsor refers at paragraphs 29 and 30 to sending money to her children and confirms that recently she has been sending money on a regular basis. The documentary evidence before the Tribunal includes the statement of the Sponsor's account with Lloyds TSB ***560 for the period 22 December 2011 to 21 March 2012. She has also submitted a list of money transmissions to the Appellants from Pokhara Travel & Money Transfer Ltd. During the period covered by the bank statement she made transmissions on 2 and 24 February and 21 March. None of the entries in the bank statements appear to link in any way to the timing of the money transmissions or the amount sent. The period covered by the bank statement ends some seven months before the date of the decision and the period covered by the statement from Pokhara Travel showing money transmissions runs from 10 January 2011–19 November 2012. The amounts sent are usually between £110 and £400. There was one transmission of £2,000. There is no explanation for this single large transmission. There are thirteen transmissions listed, their frequency is erratic. The first transmission is for £810 which is the only other transmission in excess of £400. The approximate periods between transmissions vary between seven months and one day. The evidence of the Sponsor's income is that it is received on a regular and fairly level basis. There was no explanation for what appears to be an unusual or irregular pattern of money transmissions.

32. The Appellants' evidence about their home in Nepal varied. Two stated that it was owned by the Sponsor and one that it was rented. Two stated that it had the benefit of running water, electricity, heating and television and one stated that there were problems with the water and electricity supplies. When asked what they would do if they were refused entry clearance, two said they would re-apply and one said she would continue her studies in Nepal. There was no explanation for these apparent inconsistencies or variations. It was never argued that the Appellants or any of them could satisfy the requirements of the Immigration Rules.

33. The Appellants' mother obtained settlement on the basis of a concession for the benefit of the widows of Gurkhas who had served in the Brigade. She was followed some six months later by her youngest child who was a minor at the time. The Appellants' appeals are based entirely on the claim that their exclusion places the United Kingdom in breach of its obligations to respect the private and family lives of the Appellants and the Sponsor and their sister which are protected by Article 8 of the European Convention.

34. Sections 117A and 117B of the 2002 Act are applicable to the hearing afresh of these appeals. They provide that the maintenance of effective immigration control is in the public interest and that it is in the public interest that persons who seek to enter the United Kingdom are able to speak English because such persons are less of a burden on taxpayers and are better able to integrate into society and that such persons should be financially independent.

35. The evidence is that the Sponsor's income is limited. Her P60 of 20 December 2013 shows total earnings of about £2,720 from three separate jobs with the same employer and payslips for a fourth employment showing gross earnings for the year 2011/12 of about £11,400.

36. The Sponsor's tenancy agreement for the year ending 30 April 2012 calls for payment of an exclusive calendar monthly rent of £550. There was no explanation for various entries in the bank statement which anyway does not show entries which could be related to payment of rent. There was no evidence whether the youngest sister was bringing any money into the household. There was no evidence the Appellants spoke English and indeed their interviews were conducted in Nepali. There was no evidence they had any prospects of employment on coming or shortly after coming to the United Kingdom. The evidence to support their claimed dependency on the Sponsor is so incomplete as to be unsatisfactory.

37. The Appellants' mother came to the United Kingdom and was permitted to settle in the United Kingdom by virtue of a concession made in favour of the widows of ex-Gurkhas. Her youngest child was granted entry clearance for settlement some six months later. The evidence of the dependency of the Appellants aged approximately 27, 24 and 21 at the date of decision is sketchy. The substantial variation in the amounts sent and the erratic timing of the transmissions, absent any explanation and there was none, is not indicative of any real dependency, even of a limited nature.

38. The rights protected by Article 8 of the Appellants' mother and sister to a family life with the Appellants need to be considered in addition to the corresponding rights of the Appellants, having regard to the jurisprudence in *Beoku-Betts v SSHD [2008] UKHL 39*. At paragraph 42 of *R (oao Gurung) v SSHD [2013] EWCA Civ 8* the Court noted:

> … if a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependent (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is strong reason for holding that it is proportionate to permit the adult child to join his family now.

39. With this in mind, I adopt the approach to appeals on grounds of Article 8 summarised at paragraphs 7-12 of *EB (Kosovo) v SSHD [2008] UKHL 41*. I accept the Appellants have a private and family life with their mother and their sister in the United Kingdom although there was no evidence before the Tribunal about how that family life is pursued, whether by letter or telephone or other means of communication. I have found the Appellants' claimed dependency on the Sponsor is at its highest limited. In these circumstances, I conclude the Appellants have not discharged the burden of proof to the balance of probabilities to show the decisions under appeal are a sufficiently grave interference with the family lives of the Appellants or their mother and sister to engage the United Kingdom's obligations under Article 8 of the European Convention.

40. In the alternative, if this assessment is incorrect, I note there was no suggestion that decisions had been taken other than in accordance with the law and due process. There would remain the balancing exercise to assess whether the decisions to exclude are proportionate to a legitimate public objective referred to in Article 8(2).

41. In addition to all the factors already mentioned, I have the relevance and impact of the historic injustice suffered by the Gurkhas. In each case it is a matter of what weight should be attached to that injustice when conducting the balancing exercise and that the historic injustice will carry significant weight and is likely to outweigh the matters relied on by the Respondent where these consist solely of the public interest in maintaining a firm immigration policy: see paragraph 59 of the determination in *Ghising and Others*. Of course, the determination in *Ghising* was promulgated well before the 2002 Act was amended by the inclusion of Section 117 in respect of which I have already made findings unfavourable to the Appellants. Crucially, in this case there was no evidence that the Appellants' father would have settled in the United Kingdom, if he had been permitted to.

42. The whole of the Appellants' family came into being long after the Appellants' father had been discharged from the Brigade. The Appellants' mother obtained settlement on the basis of a concession in favour of widows of ex-Gurkhas. There was a lack of evidence generally and, in particular, a failure to show the Appellants' material dependency upon their mother and the nature of their family life.

43. I make no adverse inference from the failure of the Sponsor or anyone to appear for the Appellants or the lack of any explanation for their non-appearance. However the consequence is that I can consider only the evidence which is to be found in the Tribunal file.

44. Looking at the matter in the round, particularly in the light of paragraph 60 of the determination in *Ghising and Others* set out above and taking into account the additional factors to be considered in the assessment of the proportionality of the decisions to the need to maintain immigration control highlighted by Section 117 of the 2002 Act as well as what impact the historic injustice against the Gurkhas has in these particular appeals, I have come to the conclusion that the Appellants have failed to discharge the burden of proof on them.

45. If, contrary to my earlier finding, the United Kingdom's obligations under Article 8 of the European Convention are engaged in this appeal, then taking into full account the historic injustice issue as well as the rest of the evidence, I find the Appellants have failed to show on the balance of probabilities that their continued exclusion from the United Kingdom is disproportionate to the economic well-being of the country which includes the need to maintain proper immigration control: see *Shahzad (Art 8: legitimate aim) [2014] UKUT 85*. Consequently each of the appeals is dismissed.

Anonymity

46. There was no request for an anonymity direction and having heard the appeal I consider there is no need for one.

DECISION

The appeal of each Appellant is dismissed on human rights grounds

Anonymity direction not made.

Signed/Official Crest Date 14. xi. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeals have been dismissed so no fee awards can be made.

Signed/Official Crest Date 14. xi. 2014

Designated Judge Shaerf