Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/30475/2011
OA/30480/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 January 2013	**On 14 January 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

GANGA PUN
PRADIP BAHADUR PUN

Appellants

and

ENTRY CLEARANCE OFFICER-NEW DELHI

Respondent

Representation:

For the Appellants: Mr R. Jesurum, Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr C. Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These appellants are brother and sister and are citizens of Nepal. They were born on 27 September 1986 and 22 February 1989, respectively. Their appeals against refusals of entry clearance come back before the Upper Tribunal following the order of the Court of Appeal dated 21 November 2013. The Court of Appeal allowed the appellants' appeals

against the decision of Deputy Upper Tribunal Judge ("DUTJ") McWilliam who, in a determination promulgated on 27 November 2012, found an error of law in the decision of the First-tier Tribunal (First-tier judge Hanratty), set aside his decision, and re-made the decisions, dismissing the appeals.

2. The appellants had applied for entry clearance for the purposes of settlement in 2007 and 2008, those applications being refused. The sponsor, their father Janga Bahadur Pun, had been granted settlement in 2005. Their mother's (Bishnu Kumari Pun) application for settlement was granted in 2008.

3. The appellants' applications for entry clearance, on the basis that they were adult dependants of a former Gurkha who was discharged before 1997, and which are the subject of this appeal were made in March 2010. Following the refusal of the applications on 8 December 2010, they appealed to the First-tier Tribunal. Immigration Judge Rimington found that there was family life between the appellants and their father. She allowed the appeals to the limited extent that the Entry Clearance Officer's ("ECO's") decision was not in accordance with the law and the matter was remitted to the ECO for a decision to be made in accordance with the appropriate policy.

4. Following Judge Rimington's determination, the ECO made new decisions on 19 December 2011, again dismissing the applications, with reference to the policies in relation to adult dependants of former Gurkha soldiers. It is those decisions which are the subject of the appeals before me and which came first before Judge Hanratty and then before DUTJ McWilliam, following which the appeals were remitted by the Court of Appeal.

5. The Court of Appeal ordered that DUTJ McWilliam's determination be set aside except that the finding of family life between the appellants and their parents is preserved, but that the proportionality assessment should be made in line with the principles in Gurung [2013] EWCA Civ 8. The purely factual, as distinct from the legal, basis of the proportionality assessment does not appear to be in dispute.

6. The appeals before me proceeded on the basis of Article 8 of the ECHR only. I have applied the structured approach set out in Razgar [2004] UKHL 27. For reasons that are apparent from the remainder of this determination, it is not necessary to embark on a full-scale examination of the relevant policies applicable to 'Gurkha' cases, to review all the authorities relied on by the appellants, or to undertake a detailed examination of these appellants' factual circumstances as they stood at the relevant date, namely the date of the latest decision to refuse entry clearance. The following summary of the relevant legal principles and the further relevant facts suffices.

7. In Gurung it was decided that the Upper Tribunal in Ghising (family life-adults-Gurkha policy) [2012] UKUT 00160 (IAC) was wrong to conclude that the "historic injustice" suffered by former members of the brigade of Gurkhas was not as severe as that suffered by British Overseas Citizens and that the weight to be attached to the injustice was "substantially less" in the Gurkha cases.

8. At [42] in Gurung the court said that

> "If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now. To that extent, the Gurkha and BOC cases are similar. That is why we cannot agree that, as a general rule, the weight accorded to the injustice should be substantially different in the two cases."

9. The appeals remitted to the Upper Tribunal by the Court of Appeal in Gurung resulted in the reported decision of Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), which I shall refer to as Ghising No.2. It is instructive to quote [59]-[60] of that decision where the Upper Tribunal said that:

> "59. ...we accept Mr Jacobs' submission that where Article 8 is held to be engaged and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this will ordinarily determine the outcome of the proportionality assessment; and determine it in an Appellant's favour. The explanation for this is to be found, not in any concept of new or additional "burdens" but, rather, in the *weight* to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. What was crucial, the Court said, was the consequence of the historic injustice, which was that Gurkhas and BOCs:
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> > "were prevented from settling in the U.K. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Gurkha who is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in maintaining of a firm immigration policy". [41]
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> In other words, the historic injustice issue will carry significant weight, on the Appellant's side of the balance, and is likely to outweigh the matters relied on by the Respondent, where these consist solely of the public interest just described.
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> 60. 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."

10. As is pointed out in the skeleton argument in the case of the appellants before me, the uncontested evidence of the sponsor was that if he had been able to apply on discharge from the brigade of Gurkhas he would have applied for settlement for all his family. He was discharged in 1994 at a time when the appellants were under 18 years of age. Judge Rimington found the sponsor to be credible and her finding in that regard survived the appeals before Judge Hanratty and DUTJ McWilliam. The appellants' skeleton argument states at [19] that at the time that the sponsor was granted settlement in 2005 the appellants were under the age of 18. It was conceded before me that that is not in fact correct in relation to the first appellant, but in the circumstances of this appeal that is not material.

11. Mr Avery accepted that he could not point to anything on the facts of these appeals which would mean the appeals should not be allowed, having regard to the decision in Ghising No.2. He accepted that there was nothing in terms of their immigration history or in the nature of any criminality, as referred to in Ghising No.2, which weighs against the appellants in proportionality terms.

12. There is nothing to indicate that the respondent relies on anything other than the interests of immigration control on the public interest side of the proportionality balancing exercise. In those circumstances, having regard to the authorities to which I have referred, I am satisfied that the decision of the respondent amounts to a disproportionate interference, or more accurately in an entry clearance case, lack of respect for, the appellants' right to family life.

13. Accordingly, the appeal of each appellant succeeds under Article 8 of the ECHR.

Decision

14. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the

decision re-made allowing the appeal of each appellant under Article 8 of the ECHR.

Upper Tribunal Judge Kopieczek

6/01/14