Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/32031/2013
IA/41698/2013
IA/41710/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 May 2015	**On 19 May 2015**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MS ASMI GURUNG

First Appellant

MR. SAGAR KUMAR GURUNG

Second Appellant

MISS. AYUSHMA GURUNG

Third Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms A. Jaja
For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

The Appeal

1. This is an appeal by the Appellants against a determination promulgated on 19th January 2015 of First-tier Tribunal Judge J. McIntosh, who dismissed their appeal under Article 8 ECHR.

2. The Appellants attended the hearing together with the first Appellant's parents, the second Appellant's parents and the brother-in-law of the first Appellant.

3. Judge McIntosh, in carrying out the proportionality assessment at [36] and [37] under Article 8, applied the case of Ghising (family life – adults – Gurkhas policy) [2012] UKUT 00160 (IAC). We found that Judge McIntosh had made an error of law by relying on this case. Following the Court of Appeal case of Gurung and others [2013] EWCA Civ 8, the case was re-decided in Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC). By placing reliance on the earlier Ghising case, we found that Judge McIntosh had taken the wrong approach to the weight to be applied to the historic wrong in the Article 8 proportionality assessment. "Substantial weight" should have been given to the historic wrong, whereas he had given it limited weight; see [37] in particular. We found that this had led to an error of law in the proportionality assessment under Article 8, and we were satisfied that this was a material error. Accordingly, we set the decision aside.

4. We proceeded to remake the decision. It was not in dispute before us that the Appellants did not meet the requirements of the immigration rules or qualify for grants of leave under the Gurkha policy.

5. It was accepted by Judge McIntosh that there was family life between the Appellants and their extended family, in particular between the Appellants, and the parents of the first and second Appellants. In accordance with the case of Razgar [2004] UKHL 27, we were satisfied that the proposed removal would be an interference in the exercise of the Appellants' right to respect for this family life, sufficient to engage the operation of Article 8. We were satisfied that this proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. The issue before us was whether or not this interference was necessary and proportionate.

6. The headnote of Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) states

> "(3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.
>
> (4) Accordingly, where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters

> relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.
>
> (5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) 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 earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters 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 of the balance."

7. The circumstances of the settlement of the first and second Appellants' parents is set out in paragraphs [5] and [11] of Judge McIntosh's decision.

8. It was submitted by the Respondent's representative that the fact that the Appellants had formed a family life in Nepal independently of their parents was enough to weigh against the historic wrong. However it was accepted by the First-tier Tribunal, as above, that, although the Appellants may have formed an independent family unit in Nepal from 2007 to 2009 when their parents were in the United Kingdom, they re-established a family life with their parents in the United Kingdom. Even when the Appellants were in Nepal without their parents, they were still financially dependent on them. It was accepted in the determination of Judge McIntosh that the Appellants were financially supported by the second Appellant's parents when they were living in Nepal. We find that they were living in the family home owned by the second Appellant's father. When the first Appellant came to the United Kingdom as a student in 2009, her tuition fees were paid by the second Appellant's father.

9. In any event, irrespective of the level of dependence during this period, it is not in dispute that the Appellants now have a family life in the United Kingdom with their parents. In our view, the fact that for a few years they lived apart from their parents in Nepal is a matter to be weighed in the proportionality assessment but not one that attracts sufficient weight to displace the "substantial weight" attracting to the historic wrong to both Appellants and their families.

10. Following paragraph 4 of the headnote in Ghising, we find that, but for the historic wrong, the first and second Appellants would have settled in the United Kingdom long ago. We find that the Appellants have not committed any criminal offences nor do they have an adverse immigration history, as accepted by the Respondent.

11. The first Appellant's parents are settled in the United Kingdom. In addition all of her three siblings are settled in the United Kingdom. They are all British citizens. Her two elder siblings are married with children, who are also British citizens. Her younger brother lives with her parents. The

second Appellant's parents are settled in the United Kingdom. He is an only child and so, as for the first Appellant, all of his immediate family are living in the United Kingdom. We find that the Appellants do not have any immediate family members living in Nepal.

12. We find that the third Appellant is the only grandchild of the second Appellant's parents. When she was born she lived in the same home as her paternal grandparents and continued to live with her paternal grandmother when her paternal grandfather came to the United Kingdom in 2006.

13. The Appellants live with the second Appellant's parents in a property owned by the first Appellant's parents. Until the first Appellant's parents moved out, the first Appellant's parents, the second Appellant's parents and the Appellants were all living at one address as one large family. We find that there is an unusually close and strong family bond both between the Appellants and the second Appellant's parents, but also between the parents of the first and second Appellants who have lived together in a shared household the United Kingdom. The first Appellant's parents now let their property to the second Appellant's parents at a nominal rent. The Appellants do not pay any rent to the first Appellant's parents.

14. We find that the first and second Appellants' parents, having taken British citizenship, have lost their citizenship of Nepal and therefore could not return to Nepal permanently to continue family life with the Appellants there. In our view, the effect of the separation of the Appellants and their family members in the United Kingdom, in particular the parents of the first and second Appellants, would be particularly severe. The Appellants would be the only immediate family members not to be living in the United Kingdom. It would be particularly severe on the second Appellant's parents, given their age and health, the fact that the second Appellant is their only child, and their close relationship with their only grandchild, the third Appellant.

15. We have considered the factors set out in section 117B of the 2002 Act. We find that weight is to be accorded to the maintenance of an effective immigration control, albeit here the Court of Appeal provides authority for that being balanced against the weight to be attached to the historic wrong. We find that the Appellants can speak English. We find that they are financially supported by their parents.

16. We find that the matter relied on by the Respondent is that of the public interest in maintaining a firm immigration policy. We find that, in the absence of the Respondent being able to point to matters over and above the public interest in maintaining a firm immigration policy, in line with Gurung and Ghising the substantial weight to be accorded to the historical wrong outweighs matters relied on by the Respondent, that being additionally so given the unusually strong family life demonstrated here. We find that the interference in the family life of the Appellants and their

parents is disproportionate to the legitimate aim of maintaining effective immigration control.

Decision

17. The decision of the First-tier Tribunal disclosed an error on a point of law and was set aside.

18. We re-make the appeals, allowing them under Article 8 of the ECHR.

Signed: Date: 14th May 2015
Deputy Upper Tribunal Judge Chamberlain
Upper Tribunal