IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40250/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th April 2015	**On 04th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MISS PURNIMA GURUNG
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Puar, Counsel
For the Respondent: Mr P. Nath, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nepal born on 6th January 1985. She appealed against a decision of the Respondent dated 30th September 2014. That decision was to refuse her indefinite leave to remain outside of the Immigration Rules. The application was made on the basis that refusal of the application would place this country in breach of its obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Kirvan sitting at Birmingham on 17th December 2014. The

Respondent appeals with leave against that decision and the matter therefore comes before me as an appeal by the Respondent. Nevertheless for the sake of convenience I shall continue to refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom on 24th October 2009 with leave as a Tier 4 (General) Student valid until 31st July 2011. Shortly before that leave was due to expire the Appellant submitted an application for leave to remain outside of the Rules but was refused. Her appeal against that decision was heard on 26th April 2012 but dismissed by Immigration Judge Steer on 14th May 2012. On 7th February 2013 the Appellant's representatives wrote to the Respondent asking for the Appellant's case to be reviewed in the light of the case of **Gurung & Others [2013] EWCA Civ 8**.

3. The Appellant's father Mr Kharka Bahadur Gurung was a former Gurkha soldier who served in the British Army for sixteen years from 1965 until November 1981 when he retired with exemplary service to Hong Kong. In 1981 the Appellant's father was not permitted to settle in the United Kingdom because at that time Gurkhas who had served in the British Army were not given the same rights as other foreign and Commonwealth nationals serving with the British forces. When her father came to leave the British Army he was told that he would have to return to Nepal. Upon return he could not find work and went to Brunei to work as a member of the Gurkha Reserve for nine years until retirement.

4. The Appellant's father died in 2003 but the Appellant's mother as a result of receiving his British Army pension funded the Appellant's education. The Appellant studied in Nepal becoming a staff nurse and applied for and obtained a student visa to further study in the United Kingdom. Whilst she was in the United Kingdom the Appellant's mother applied for and obtained settlement as the widow of a Gurkha. The Appellant's mother arrived in this country on 4th November 2010 and the two have been supporting each other since.

The Refusal

5. When the appeal was heard by Judge Steer in 2012 the Judge found there was family life between the Appellant and her mother but this related solely to financial dependency. She was not satisfied of the mother's claimed dependency on the Appellant nor was she satisfied of the Appellant's claimed dependency on her mother beyond finance. Judge Steer found that when the Appellant came to the United Kingdom she did not intend to return to Nepal and live with her mother, the intention was to obtain the necessary qualifications and work as a nurse in this country. The Appellant was registered as a nurse in Nepal and had two other siblings there. The Appellant's presence in the United Kingdom was on a limited basis as a student. Judge Steer found that it would be proportionate for the Appellant to return to Nepal even taking into consideration the issue of the historical wrong.

6. The Respondent refused the Appellant's application dated 7th February 2013 relying on the decision of Judge Steer. Unlike in the case of **Ghising**

[2013] UKUT 567 the Appellant could not show that her father wished to settled in the United Kingdom. The Appellant's mother had stated that her late husband wanted to stay in Hong Kong. The Appellant could not show emotional dependency on her mother beyond that of normal emotional ties. The Appellant could not bring herself within Appendix FM, she neither had a partner nor a child in this country. She could not bring herself within paragraph 276ADE of the Immigration Rules as she had not been resident here for at least twenty years. There were no serious obstacles to the Appellant's reintegration into Nepal. She could speak the language and still had family there. She had not severed all ties. The Appellant had spent her formative years in Nepal and had only come to the United Kingdom with the knowledge that she had leave to remain on a temporary basis. That the Appellant's mother had been granted settlement as the widow of a former Gurkha was not considered a sufficient reason to justify further leave.

The Hearing at First Instance

7. The Appellant argued that she had been the victim of an historic injustice since if her father had been allowed to stay in Hong Kong or the United Kingdom on his retirement he would have done so and the Appellant would have been born with rights to settle in one or other or both territories. Her mother's poor health and her father's illness and death had brought the mother and daughter closer.

8. In closing submissions to Judge Kirvan the Presenting Officer stated that since **Ghising** had been decided Article 8 had moved on significantly. Not only had Appendix FM been introduced but so had amendments to the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014. The Appellant was not financially independent and in assessing the proportionality exercise the provisions of Section 117B counted against the Appellant.

9. In her determination Judge Kirvan made clear that she was aware that she had to take into account Section 117B of the 2002 Act, in particular that it was in the public interest to maintain effective immigration control. Little weight could be given to the Appellant's private life established whilst she had no leave or her leave was precarious. The Judge did not allow the appeal under Article 8 on the basis of the Appellant's private life. Instead she allowed the appeal on the basis of the family life between the Appellant and her mother taking into account the case of **Ghising**.

10. In **Ghising** it was held that the effect of the historic wrong was not to reverse or otherwise alter the burden of proof that applied in Article 8 proportionality assessments. When an Appellant has shown that there is a family/private life and the decision made by the Respondent amounts to an interference with it the burden lies with the Respondent to show that the decision to remove is proportionate. What concerned the Court of Appeal in **Gurung** was not the burden of proof but rather the issue of weight in a proportionality assessment. The historic wrong suffered by Gurkha ex-servicemen should be given substantial weight. Where it is found that Article 8 is engaged and but for the historic wrong the

Appellant would have been settled in the United Kingdom a long time ago this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour where the matters relied on consist solely of the public interest in maintaining a firm immigration policy. Judge Kirvan distinguished the decision of Judge Steer on the basis that at the time that Judge Steer heard the Appellant's appeal the weight given to the historic wrong was not as significant as other categories of Appellants e.g. of British Overseas Citizens.

11. Although Judge Steer had given some weight to the historic wrong it was clear from **Ghising** that the weight that had to be given to it was substantial and it would ordinarily determine the outcome of an Article 8 proportionality assessment in an Appellant's favour. Judge Steer had found that family life was engaged and accepted the evidence of the Appellant's mother that her husband the Appellant's father would have settled in the United Kingdom at the end of his Gurkha service at the end of 1981 had he been allowed to do so in which case the Appellant would have been born in the United Kingdom. There was a lack of medical evidence to support other aspects of the family life but Judge Kirvan directed herself that she had to weigh in the balance the family life of the Appellant and her mother which they shared in the United Kingdom against the public interest in effective immigration control. The decision of the Respondent rested primarily on the need to enforce immigration policy. Given the weight to be ascribed to the historic wrong and given that there were no other factors which might tip the scales against the Appellant the interference with the Appellant's family life was disproportionate and the appeal was allowed.

The Onward Appeal

12. The Respondent appealed against that decision arguing that the Judge had failed to give adequate reasons for finding that the Respondent's decision was disproportionate. Judge Steer had found that family life was engaged on the basis of financial dependency only. Since **Ghising** primary legislation had been enacted by 117A and 117B of the 2002 Act not in force when **Ghising** was decided. There was no evidence before the Tribunal that the Appellant could speak English. The Tribunal had found that the Appellant's father would have settled in the United Kingdom at the end of his Gurkha service in 1981 if he had been allowed to at that time when in fact the Appellant's own witness statement said that he had wanted to stay in Hong Kong.

13. The application for permission to appeal came on the papers before Designated Judge Coates. In granting permission to appeal he found the Respondent's grounds arguable. The matter therefore came before me to determine whether there was a material error of law in the Judge's decision such that it fell to be set aside. If there was then I would have to proceed to rehear the appeal. If there was not the decision at first instance would stand.

The Hearing Before Me

14. For the Respondent it was argued that there had been a failure by the Judge to consider the public interest in immigration control which Tribunals were directed to consider by the statute. For the Appellant Counsel argued that there was evidence that the Appellant could speak English as she had given her evidence at first instance without use of an interpreter. The Judge had had regard to the proportionality exercise under Section 117B, explicitly referring to it in the determination. The Appellant had not said that her father wished to live in Hong Kong, what she had said was he wished to live in the United Kingdom or Hong Kong. It was the Appellant's mother's evidence that he wished to live in the United Kingdom. As the wife of the deceased the Appellant's mother was in a much better position to know what her husband thought than the Appellant was. It was reasonable for the Judge to prefer the evidence of the Appellant's mother.

15. It made no material difference where the Appellant's father could have settled down (if he had been allowed to) since if he had been allowed to settle in the United Kingdom the Appellant would have been born there and as the Appellant was born in 1982 a year after the Nationality Act 1981 came into force, if she had been born in Hong Kong she would have been a British Territories citizen. Once Hong Kong had passed under Chinese rule then by virtue of the Hong Kong Act 1997 she could apply for British citizenship. There were no countervailing factors pursuant to the case of **Ghising** that would undermine the historic injustice argument. The provisions of Section 117A and B codified existing case law and highlighted what Judges had to take into account when carrying out the proportionality exercise but did not affect the decision in this case. The Presenting Officer indicated he had nothing further to say in reply. At the end of submissions I indicated that I would dismiss the Respondent's appeal and give my reasons in writing which I do so now.

Findings

16. The Appellant and her mother have a family life in this country. If the Appellant is required to return to Nepal that family life will be interfered with. The Respondent's argument is that the interference is pursuant to the legitimate aim of immigration control and relies on Section 117B(1). The question is whether the interference with the Appellant and her mother's family life is proportionate to the legitimate aim being pursued. Section 117A and B set out a statutory framework which must be followed by Tribunals assessing the proportionality of interference with protected rights. It is in the public interest that persons who seek to remain in the United Kingdom are able to speak English which this Appellant can do. It is also in the interests of the economic wellbeing of the United Kingdom that persons seeking to remain should be financially independent. The Appellant has work experience as a nurse in Nepal and the Judge noted the Appellant's strong desire to work (paragraph 40 of the determination). Although therefore there was a financial dependency by the Appellant on her mother sufficient to enable there to be said to be family life over and above normal emotional ties, the Appellant did have an ability to work if permitted to do so and would not therefore be a burden on the tax payers.

17. In short there were no particular statutory factors in this case which weighed heavily against the Appellant when considering the proportionality of interference outside the Immigration Rules. What was important to consider was the weight to be afforded to the fact that the Appellant could not meet the Immigration Rules when weighed against the historic injustice argument that the Appellant was putting forward. As the higher courts have reminded the Tribunal significant weight has to be attached to the interests of immigration control and that has been clarified by the Court of Appeal in the recent decision of **SS (Congo)**. Were it not for the argument as to historic injustice it would be difficult to say that there was anything on the Appellant's side which outweighed the public interest in the enforcement of immigration control given that the Appellant could not satisfy the Immigration Rules.

18. However the case did not stop there and the trial Judge had to consider the issue of historic injustice. Had it not been for the policy in 1981 when the Appellant's father retired from the British Army that Gurkhas were not allowed to settle in the United Kingdom, the Appellant would have been born in this country and the situation would now be very different in terms of her entitlement to citizenship. If the historic wrong argument applied in this case it would have considerable weight and could as the Judge found outweigh the argument that the Appellant was seeking leave to remain outside the Rules.

19. The question was did the historic injustice argument apply? For it to apply the Appellant had to show on the balance of probabilities that it was more likely than not that her father would have chosen to remain in the United Kingdom. The Judge heard evidence from both the Appellant and her mother and accepted the evidence of the Appellant's mother that the Appellant's late father had indicated that he did wish to remain in the United Kingdom if he could have done so. It was a matter at the end of the day for the Judge to decide what evidence she chose to accept. Another Judge might have come to a different view but that does not mean that this Judge was wrong in law. It was open to the Judge to prefer the evidence of the Appellant's mother over other matters and to accept that this was a case to which the historic injustice argument would apply following the case of **Ghising**. Given the indication in **Ghising** of the weight to be ascribed to the historic injustice argument in the balancing act and given the lack of countervailing factors, (this Appellant does not have a poor immigration history and she has not been involved in criminality), it was open to the Judge to find as she did that the Respondent's decision was disproportionate in this case. That being so there can be no error of law in the Judge's decision or in the assessment of proportionality. I therefore dismiss the Respondent's appeal.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to allow the Appellant's appeal against the Respondent's decision to refuse leave.

Respondent's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 2nd day of June 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

The Judge declined to make a fee award in this case due to the lateness of important evidence which led the Judge to the decision he made. I see nothing wrong in principle with the Judge's decision thereon and I do not disturb it.

Signed this 2nd day of June 2015

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Deputy Upper Tribunal Judge Woodcraft