The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: OA/14573/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On September 22, 2015	**On October 5, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Before

MR INDRA KUMAR GURUNG
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
Appellant Mr Jesurum, Counsel, instructed by Howe & Co Solicitors
Respondent Mr Tarlow (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, a national of Nepal, applied on February 22, 2013 for entry clearance as an adult dependent. The respondent considered his application under Section EC-DR1.1 of Appendix FM of the Immigration Rules and on June 19, 2013 she refused his application for not satisfying Sections E-ECDR 2.4, 3.1 & 3.2 of Appendix FM and for not meeting the requirements of the "Ghurkha" policy or article 8 ECHR.

2. The appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and the appeal came before Judge of the First-tier Tribunal Clarke on July 23, 2014 and in a decision promulgated on September 1, 2014 the appellant's appeals were dismissed.

3. The appellant sought permission to appeal but both Judge of the First-tier Tribunal Parkes and Upper Tribunal Kekic rejected his application on November 24, 2014 and March 18, 2015 respectively.

4. The appellant lodged an application for judicial review and on April 28, 2015 Mr Justice Mostyn stated-

> "I am satisfied it is arguable that Judge of the First-tier Tribunal Clarke made a grave and highly material error of law in determining whether the article 8 right to family life was engaged."

5. On May 29, 2015 the Upper Tribunal's refusal to grant permission to appeal was quashed.

6. A Rule 24 response was filed by the respondent on July 9, 2015 and on September 10, 2015 Vice President Ockelton granted permission stating-

> "Permission is granted in light of the decision of the High Court in this case. The parties are reminded that the Upper tribunal's task is set out in Section 12 of the Tribunals, Court and Enforcement Act 2007"

7. Section 12 of the Tribunals, Court and Enforcement Act 2007 states:

> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either—
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal—
>
> (a) may make any decision which the First-tier Tribunal

could make if the First-tier Tribunal were re-making the decision, and

(b) may make such findings of fact as it considers appropriate.

8. The matter came before me on the above date and both representatives made submissions on whether there had been an error in law albeit these submissions were limited to the Tribunal's approach to the issue of article 8 ECHR.

9. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

SUBMISSIONS

10. Mr Jesurum submitted that as this was a Ghurkha case the appellant must succeed under article 8 ECHR if he demonstrated that family life existed between him and his his parents. He submitted the First-tier Tribunal erred by failing to find family life existed. The Tribunal had erred when considering family life because it should have had regard to all of the affected parties and the historic injustice suffered by the family. He submitted that following the decisions of Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) and Gurung & Others v SSHD [2013] EWCA Civ 8 if family life and dependence is established then it would be disproportionate to refuse him entry to the United Kingdom-something the respondent's representative accepted when the appeal came before Judge of the First-tier Tribunal Clarke. He argued the Tribunal failed to attach sufficient weight to the appellant's mother's medical condition's/appellant's condition as well as the appellant's father's commitment to the appellant. Financial support was evidence of a cultural bond and the Tribunal failed to make findings on this and wrongly concluded that the appellant had to show "indispensable support". An earlier decision was the starting point but was decided based on the case law of Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 which the cases of Ghising and Gurung had stated was too restrictive and that earlier decision had no regard to the appellant's mother's medical condition. The Tribunal had failed to engage with the fact the appellant was still young and was being supported by his father and continued to live in a family home. The appellant's father was trying to keep the family together when he came to the United Kingdom and the appellant remained in a family home. If these factors had been properly considered, then the appeal would have been allowed under article 8 ECHR. The Tribunal failed to have regard to the test set out in paragraph [49] of AA v UK [2012] Imm AR 1 and in paragraph [14] Patel v ECO [2010] EWCA Civ 17 and he submitted there was an error in law and the article 8 decision should be remade and the appeal allowed.

11. Mr Tarlow relied on the Rule 24 letter filed. He submitted the Tribunal had taken into account the degree of hardship and the bonds established

between the appellant and sponsors and concluded these factors were insufficient to engage article 8(1) ECHR. The Tribunal had regard to the evidence of depression as well as the fact the appellant was studying but it also had regard to the fact the appellant was living with a family member who occasionally cooked meals for him. Despite the level of financial support, the appellant was living an independent life as a thirty-year-old male.

12. I reserved my decision.

DISCUSSION AND REASONS ON ERROR IN LAW

13. Mr Jesurum's submission is that if the appellant's father had been granted his status in the United Kingdom when he finished his service for the armed services in 1986, the appellant would have been living here and would have been entitled to be educated here and the fact they were separated did not mean there was no family life.

14. The appellant's parents had been granted indefinite leave to enter the United Kingdom on July 13, 2009 based on the fact the appellant's father had served in the British army for twenty-five years. He had been discharged in 1986 and his evidence was that if he had been given the opportunity to settle in the United Kingdom in 1986 he would have done. At that time the appellant would have been three years of age and clearly eligible for permission to be with his parents as a dependent.

15. A similar application, to the current one, was submitted in April 2010 but this was refused and on appeal to the First-tier Tribunal, the Judge found the appellant had an older sister and other relatives living in Nepal and he concluded there would be no breach of family life because the appellant was not dependent and they could maintain contact with each other by telephone and other media and the appellant's parents would be able to visit him in Nepal and accordingly there was no breach of the existing family life.

16. Following the decision of Ghising the appellant renewed his application but this was rejected by the respondent and his appeal was then rejected by the First-tier Tribunal.

17. Mr Jesurum submitted the First-tier Tribunal's assessment did not go far enough in that it failed to consider the whole issue of family life specifically as it applied to Ghurkha cases. He referred me to the decision of AA and argued the First-tier Tribunal had incorrectly assessed the dependency the appellant had on his parents.

18. In response to this Mr Tarlow argued that the appellant was independent and whilst he had some dependency the First-tier Tribunal had been entitled to conclude that article 8 was not engaged.

19. The Court in AA at paragraph [49] found-

> "… as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace 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 Article 8."

20. The First-tier Tribunal dealt with a thirty (now thirty-two) year old male who had been living apart from his parents for a number of years. The First-tier Tribunal was entitled to take this into account, as well as the written and oral evidence of the parties, when considering whether there was family life.

21. Mr Jesurum has submitted the First-tier Tribunal failed to give sufficient weight to the historic injustice suffered or the fact the appellant was still reliant on his father. At paragraph [14] of Patel the Court of Appeal stated-

> "… 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 article 8 claims such as these. It does not make the Convention a mechanism for turning the clock back but it does make the history and its admitted injustices potentially relevant to the application of article 8(2)"

22. The Tribunal in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) considered what the Court meant in Gurung with regard to the issue of historic injustice and proportionality. They found at paragraphs [59] and [60]-

> "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:
>
> > "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]

> 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.
>
> 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."

23. With this background and the representative's submissions in mind I have considered the First-tier Tribunal's approach.

24. The First-tier Tribunal accepted that the historic injustice argument was relevant but concluded on its own it was not in itself sufficient to permit the appellant entry clearance. The First-tier Tribunal had regard to the following:

    (i) The appellant was thirty years of age and had been studying for a number of years.

    (ii) He had lived apart from his parents for a number of years.

    (iii) He was living with a family member albeit he had a large degree of independence.

    (iv) His parents contributed money to his studies and upkeep from their benefits.

    (v) The appellant had not demonstrated he was dependent on his parents.

    (vi) There was a lack of medical evidence to support the claim that the appellant suffered from any medical problems and the medical evidence concerning the appellant's mother demonstrated nothing more than ailments connected with people who were getting older.

25. The Tribunal's assessment of article 8 is contained between paragraphs [16] and [20] of its decision. The Tribunal took as its starting point the previous Tribunal's decision from 2010 and had in mind the decision of

Gurung when assessing whether article 8 was engaged. The Tribunal noted in paragraph [17] of its decision-

> "… What I have to do is differentiate between the usual emotional bonds between parents and their children with a case where there is a requisite degree of emotional dependence."

26. Mr Jesurum submits the Tribunal applied the wrong test.

27. The case of Gurung is of assistance in this case for two reasons. Firstly, the Court set out the approach that should be taken in article 8 cases involving Ghurkha dependents and secondly it considered cases similar to the appellant's.

28. The Court's approach in Gurung, to the issue of family life, is set out in paragraphs [45] to [46]. The court stated-

> "45. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case… in some instances an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents. It all depends on the facts.
>
> 46. Paras 50 to 62 of the determination of the UT in *Ghising* contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at para 62 that the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive."

29. At paragraphs [47] to [50] of the Gurung the Court considered the appeals of two applicants who were 24 and 26 years of age and whose parents came to live in the United Kingdom in circumstances similar to the appellant's in this appeal. Like the appellant these applicants were students and were both funded by their fathers. The First-tier Tribunal (in Gurung) concluded:

> (i) There was little evidence of family life between them although there was evidence the father supported the applicants but that this was expected in Nepalese culture.
>
> (ii) There was nothing to suggest a bond over and above that usually to be expected from the relationship between adult parents and their children.

30. The basis for their appeals was that the Tribunals erred in law in failing to attach any (or any adequate) weight to the fact that the appellants had always lived with their parents as a family unit. It was argued before the court that the family unit, with a strong emotional bond and elements of financial dependency, enjoyed family life while the appellants were growing up and it was not suddenly cut off when they reached their majority. The Court concluded there was no error of law. The critical issue was whether there was sufficient dependence, and in particular sufficient

emotional dependence, by the appellants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the First-tier Tribunal to determine. In their view, the First-tier Tribunal was entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent.

31. Every case is fact sensitive and in assessing whether there has been an error in law I have to consider whether the First-tier Tribunal had regard to all of the fact sensitive issues and thereafter approached his claim applying the correct test.

32. I accept the sponsors are honest witnesses but they are not medical experts. The Tribunal rejected aspects of the appellant's case in so far as the medical issues were concerned and those findings were clearly open to it for the reasons given, despite Mr Jesurum's submissions.

33. The mere fact the appellant's father financially supported the appellant did automatically mean there was family life and as the courts have made clear being a Ghurkha dependent does not mean an automatic entry to the United Kingdom.

34. This appellant had lived apart from his parents for a number of years albeit not through choice. The First-tier Tribunal was aware of the level of contact between the parties, the background and all of the current circumstances but was not satisfied there was family life. As the courts have made clear each case has to be considered on its merits.

35. I am not satisfied that the First-tier Tribunal failed to deal adequately with the issue of family life. The Tribunal set out all the relevant factors and demonstrated it was clearly aware of the family circumstances and in particular those in which their father and mother came to live in the United Kingdom while the appellant remained in Nepal. The Tribunal took into account the appellant's age at the date of decision and the fact that his father was paying everything for his upkeep. The Tribunal was entitled to reach the conclusion that the appellant had failed to show anything behind the normal relationship between adult children and his parents. The Tribunal's findings about the appellant living independently must be read in the context of the evidence as a whole and does not indicate any misdirection or misunderstanding of the family position.

36. It is therefore not the case as the grounds allege that the judge failed to consider the family as a whole or make a lawful article 8(1) assessment.

37. I am satisfied, having considered all of the submissions, the Tribunal's findings were open to it and that consequently there is no error in law.

DECISION

38. There was no material error. The original decision shall stand.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed: Dated:

Deputy Upper Tribunal Judge Alis