



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/03357/2017**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 27 September 2018**

**Decision & Reasons
Promulgated
On 7 December 2018**

Before

Deputy Upper Tribunal Judge MANUELL

Between

**Miss GANESH KUMARI LIMBU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Khalid, Counsel (Direct Access)

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Davidge on 9 August 2018 against the decision and reasons of First-tier Tribunal Judge Haria who had dismissed the appeal of the Appellant seeking settlement as the adult dependant relative of an ex Gurkha soldier under the Home Office policy. The decision and reasons was promulgated on 12 March 2018.
2. The Appellant is a national of Nepal, born on 15 June 1987. The Entry Clearance Officer's decision was dated 3 February 2017 and was to the following effect. The Appellant was leading an independent adult life. She was not wholly financially or emotionally dependant on her parents. She had lived apart from them for over two years. There were no exceptional circumstances. The terms of Home Office Gurkha Dependants policy were not met. There was no disproportionality in Article 8 ECHR terms when the balancing exercise was performed. The judge found that the Home Office policy was not met and that as the Appellant was able to work (although not working by choice) and leading an independent life, her exclusion was proportionate. She dismissed the appeal on that basis, having found that there was sufficient family life to engage Article 8 ECHR.
3. Permission to appeal was granted because it was held arguable that, having found family life existed so that Article 8 ECHR was engaged, the judge needed to explain the weight to be given to the "historic injustice" as well as to immigration control, and why the "historic injustice" did not outweigh immigration control: Ghising and Others (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567 (IAC).

Submissions

4. Mr Khalid for the Appellant relied on the grounds of onwards appeal and grant. In summary, he submitted that the judge had completely failed to address the central issue of historic injustice. Family life had been accepted.

The judge had applied the earlier Ghising (Family life -Adults - Gurkha policy) [2012] UKUT 00160 (IAC) rather than the later Ghising and Others (Gurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567 (IAC), which was an error of law. Although the judge had misunderstood the Home Office policy, the main problem in the decision and reasons was her Article 8 ECHR analysis. Once it had been shown that the Appellant's sponsor would have settled in the United Kingdom but for the historic injustice, the proportionality balance fell in her favour, as Gurung [2013] EWCA Civ 8 showed. The determination should be set aside and remade in the First-tier Tribunal.

5. Mr Kandola for the Respondent submitted that there was no material error of law. The judge had made appropriate citations and made them accurately. A fact sensitive assessment had been required and the judge's reasons for finding that Home Office policy was not met were unimpeachable. Whichever Ghising decision was applied the result was the same on the facts found, i.e., the Appellant was leading an independent life. The onwards appeal should be dismissed.
6. In reply, Mr Khan reiterated his submissions. The Appellant had been under 30 when her entry clearance application had been made. Family life had been found. There would need to be rehearing.

Error of law finding

7. The present appeal has not been straightforward to decide. The evidence provided to the First-tier Tribunal fell well short of establishing anything beyond the normal emotional ties between the Appellant, an adult daughter aged 30 at the date of the hearing (the relevant date for Article 8 ECHR purposes), and her parents. The Appellant's witness statement was in substance barely an A4 page long, and made a series of vague and unfounded assertions, such as the claim that she had remained dependant on her parents despite having gone to work in Qatar for two years, a claim admitted to be wrong by the sponsor during oral evidence. Both witness statements unhelpfully sought to argue the case rather than setting

out the facts relied on. The sponsor's witness statement was just as brief as the Appellant's and simply asserted emotional dependency, without any examples or details. There was no explanation of why the claimed relationship with the Appellant was different from the relationship with the sponsor's other adult children. There was no evidence from the Appellant's mother. It was not in dispute that the Appellant was fit and well, of at least normal intelligence, readily capable of her own care and had lived apart from her parents for at least two periods of two years or more. The judge found that the Appellant was able to work. She has sisters and other relatives in Nepal with whom she is in contact, and from whom the judge found she receives emotional support.

8. The Appellant was under the age of 30 when she applied for entry clearance to join her parents. The judge made no finding to the contrary, but found that the Appellant did not meet the essential policy requirements because she was neither wholly financially nor emotionally dependant on her parents. Ample reasons are given for those findings. Home Office policy was thus not met. Mr Khalid was wise not to press any serious challenge to that part of the determination.
9. The judge found as fact that the Appellant was leading an independent life in Nepal: see [46] of the decision and reasons. It is not at first blush easy to see why, in the face of that unequivocal and properly reasoned finding, that the judge went on to find that there was family life continuing between the Appellant and her parents: see [56] of the decision and reasons. This finding does not follow Kugathas [2003] EWCA (Civ) 31 (or Kopoi [2017] EWCA Civ 1511) and creates an impossible and irreconcilable tension in the decision and reasons, which throws into doubt all that follows.
10. In this tribunal's view, the judge inadvertently fell into error when reaching a finding that there was family life sufficient to engage Article 8 ECHR protection, which helps explain why the determination is not easy to understand and why the Article 8 ECHR reasoning which follows is unsatisfactory. Mr Khalid complains with some justification that Ghising [2013] (above) was not followed. Mr Kandola

sought to persuade the tribunal that there was no difference of substance between Ghising [2012] and Ghising [2013], at least on the facts found in this appeal, but in the tribunal's view the judge needed to show that both authorities had been properly considered and applied. There is a difference of emphasis between them in the Article 8 ECHR proportionality assessment, in the impact of the "historic injustice". Consideration of that difference might have changed the outcome, if the inconsistent findings could be resolved.

11. This area of law has some complexity, as the number of authorities indicate. The judge prepared a conscientious determination but with reluctance the tribunal has concluded that it cannot stand because of the inconsistent findings and the absence of consideration of Ghising [2013]. Mr Khalid contended that this was not an appeal which could be remade in the Upper Tribunal if inconsistent findings were established, because there was no proper way to resolve them. The tribunal agrees. With regret, the decision and reasons must be set aside and the appeal reheard in the First-tier Tribunal.

DECISION

The appeal to the Upper Tribunal is allowed

The making of the previous decision involved the making of material errors on a point of law. The decision is set aside. It will be remade in the First-tier Tribunal by any judge other than First-tier Tribunal Judge Haria

Signed
2018

Dated 27 September

Deputy Upper Tribunal Judge Manuell