Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11108/2017**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 30th April 2018	**On 3rd May 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

JAGAT PUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Khalid (Direct Access)
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Nepal born on 5 November 1991. He appeals against the decision of First-tier Tribunal Judge Malcolm, dated on 28 February 2018, dismissing his appeal against deportation on human rights grounds.

2. Permission to appeal was granted by First-tier Tribunal Judge Bird on 20 March 2018 on the following grounds: "The appellant seeks permission to appeal against this decision on the grounds that the judge made an arguable error of law in dismissing the appeal on human rights grounds. It is argued that in doing so the judge failed to properly consider the decisions regarding 'righting the historical wrong' in relation to

dependents of ex-Gurkha soldiers. The grounds in relation to this are without merit because the appellant was granted entry clearance and subsequently indefinite leave to remain because he was such a dependent. The second limb of the grounds seeking permission are in relation to the deportation and the judge's failure to consider the probation reports and the fact that the appellant was now drug free led to an error of law in relation to his consideration of paragraphs 398 and 399. It is arguable that in considering the appellant's offending history the judge has failed to consider the provisions of paragraph 398 and 399 which form part of the respondent's decision. The judge limited himself to consideration only of section 117 of the Nationality, Immigration and Asylum Act 2002 as (amended). The failure to consider this limb has led to an arguable error of law be made."

Submissions

3. Mr Khalid submitted that the judge failed to consider the probation report and the evidence of the witness, Krishna Rai, in his findings. The Appellant was no longer a risk to the public. The judge failed to consider future risk in assessing proportionality. Further, there were compelling circumstances in this case. It was accepted that the exceptions to deportation did not apply. However, the Appellant had established family and private life. Paragraph 138 of the decision did not deal with historic injustice. There was no specific reference to it or to the application of the principles in Gurung [2013] EWCA Civ 8. The Appellant would have come to UK sooner, but for the historic injustice. Had his father been granted settlement on discharge, the Appellant would have been born in the UK and acquired British citizenship. He had picked up his drug habit in the UK, but was no longer offending. The proportionality assessment required a more detailed consideration of the Appellant's particular circumstances. The judge failed to deal with the historic wrong in the context of proportionality.

4. Mr Bramble submitted that permission had not been granted on this ground. Judge Bird stated that the grounds relating to historic injustice were without merit. In any event, the judge did consider historic injustice. This not an entry clearance application and the historic injustice had been resolved in the grant of indefinite leave to enter in 2010. The judge took into account that the Appellant was drug free [98 and 125] and the evidence of Krishna Rai [113] in his findings. He was fully aware of the Appellant's circumstances. He dealt with historic injustice [138 and 139]. The judge had taken into account all public interest factors and was entitled to come to the findings he did. There was nothing more the judge could have done. The decision should be upheld.

5. During the course of Mr Bramble's submissions, I indicated that there was no probation report on the court file. It was not in the Appellant's bundle. Mr Bramble submitted that there was no mention of a probation report in the submissions made by Mr Ahmed, the Appellant's representative before the First-tier Tribunal. There was no reference to a probation report in any of the material before the First-tier Tribunal. Mr Khalid submitted that he had been told there was a probation report, but he did not have one in his papers. He submitted that the judge could have made enquiries of both

parties to find out about sentencing remarks and pre-sentence reports. The judge should have enquired about evidence which was capable of supporting Krishna Rai's evidence. The judge should have taken steps to ensure he had all relevant material to ensure a fair hearing and comply with Article 6.

6. Mr Khalid submitted that the UK was the best place for Appellant. He was not cured by his rehabilitation in Nepal [97]. The judge did not go further and consider the risk of relapse in Nepal. The Appellant was remorseful [92] and had changed his attitude. The judge failed to take into account all relevant matters. He failed to make specific reference to the historic wrong. The Appellant should be permitted to remain in the UK. He was being denied the opportunity to continue his family life, which had to be taken into account in the assessment of proportionality.

7. Mr Khalid submitted that, but for the historic injustice, the Appellant would have been settled in the UK and could have applied for British citizenship, such that he could not be deported. His drug problem was 'home grown'. The judge could have done more in his proportionality assessment. In order to show compliance with Gurung, the judge needed to show he had taken into account the importance of the historic injustice. In Ghising (Gurkhas/BOC's – historic wrong – weight) [2013] UKUT 567 (IAC), the Tribunal, in assessing proportionality, found in favour of the appellant. In this case, the prevention of crime was also relevant, but the judge did not consider all the material. In the interests of justice, the case should be remitted. The Appellant had no one to return to in Nepal.

Discussion and Conclusion

8. The Appellant came to the UK in September 2011 as a dependent of his father who was granted settlement as an ex-Gurkha soldier. The Appellant lived with his mother and father, who have some health problems and his brother until May 2017. He has two older brothers who still live in Nepal. The Appellant returned to Nepal on two occasions: with his brother to visit friends and for ten months in 2015/2016 when his father made arrangements to send him to a rehabilitation centre to deal with his addiction issues.

9. The Appellant has 10 previous convictions for 15 offences. His first conviction, on 12 April 2013, was for failing to attend or remain for the duration of a follow-up assessment following a test for class A drugs. In August 2015 he was convicted of possessing heroin. Thereafter, he has nine convictions for shoplifting. The Appellant was warned in October 2016 and March 2017 that his offending behaviour may lead to deportation. His last conviction was on 30 May 2017 for shoplifting and battery. He was sentenced to 56 days imprisonment. A deportation order was signed on 17 July 2017 and his human rights claim was refused on 20 September 2017.

10. The judge made the following findings, which are not in dispute: The Appellant's parents lived independently and would be able to continue to do so [109]. The Appellant has not been caring for his parents [112]. The Appellant's father may have some difficulties supporting him on return to Nepal [119]. The Appellant is 26 years old, he does not have any health

problems and he will be able to maintain himself on return [120]. Some degree of assistance would be available to him from his brothers in Nepal [121]. There would not be very significant obstacles to re-integration [125]. The Appellant has family and private life in the UK [131]. He is a persistent offender and foreign criminal [132]. The deportation of foreign criminals is in the public interest [133].

11. The judge found that the Appellant was a persistent offender and therefore a foreign criminal to whom section 117C applied. There was no challenge to this finding in the grounds of appeal. Section 117C is in similar terms to paragraphs 398 and 399 of the Immigration Rules. Although permission was granted on the basis that the judge failed to consider paragraph 398 and 399, it was accepted by Mr Khalid that the Appellant could not satisfy the exceptions set out therein. There was no error of law in respect of the judge's application of section 117A to 117D of the 2002 Act or the failure to refer to paragraphs 398 and 399 of the Immigration Rules.

12. In relation to the grant of permission, I give the Appellant the benefit of the doubt and find that, although the judge considered there was no merit in the ground of appeal relating to the historic injustice, he did not specifically refuse permission on that ground.

13. There was no probation report on the court file and none was produced before me. The judge cannot be criticised for failing to take into account material which was not before him. I am not persuaded that it was incumbent on the judge to seek out material which might corroborate the evidence of a witness. The probation report has not been produced and there was no mention of it in the Appellant's documents submitted in support of the appeal nor in the submissions made by the Appellant's representative at the hearing. The judge was not obliged to conduct a fishing expedition to seek out evidence which might exist. The burden is on the Appellant to provide sufficient evidence to support his case. If there was evidence which supported the testimony of the witness Krishna Rai, then it was for the Appellant to submit that evidence.

14. In any event, the judge took into account the evidence of Krishna Rai which he set out at [55 and 56]. The judge found at [113]: "Evidence was also provided of the appellant's change of attitude as supported by the evidence of Mr Rai. It is clear that the appellant earnestly wishes to remain in the UK and whilst they may well be a change in his attitude I did not find the appellant to be a particularly impressive witness." I find that the judge took into account the evidence of Krishna Rai in his findings on Article 8.

15. The judge also took into account the risk of re-offending having found at [98 and 125] that the Appellant's drug addiction was successfully treated. He also considered whether the Appellant needed to remain in the UK to maintain this position.

16. The judge made the following findings on the historic injustice:

> "102. Emphasis was placed on the historic injustice and the need for the appellant to remain in the UK to maintain the family unit."
>
> ...

138. I accept that the position of the appellant being the child of an ex-Ghurkha soldier does place a different emphasis on the element of family life however this I consider has to be weighed against other public interest considerations."

139. I do not consider the appellant's position as the child of an ex Gurkha soldier is determinative in tipping the balance in favour of the appellant when considering the appeal under Article 8."

17. The judge's approach was consistent with Ghising in which the Tribunal held: "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."

18. I find that the judge did take into account the historic injustice and the weight to be attached to it. He balanced it against the Appellant's criminal behaviour, a legitimate public interest consideration. The judge took into account all relevant factors in his assessment of proportionality, including the emotional effect on the Appellant's family in the UK. His finding that Appellant's right to family did not outweigh the public interest was open to him on the evidence before him.

19. Accordingly, I find that there was no error of law in the decision of 28 February 2018 and I dismiss the Appellant's appeal.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed Date: 30 April 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 30 April 2018

Upper Tribunal Judge Frances