Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15704/2017**

HU/15706/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 October 2018	**On 7 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

BEG MAYA THAPA
(ANONYMITY DIRECTION NOT MADE)
First Appellant
BIRKASH THAPA
(ANONYMITY DIRECTION NOT MADE)
Second Appellant
and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

For the Appellant: Ms N Nnamani (counsel) instructed by Howe & Co, solicitors
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

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2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Birk promulgated on 19 June 2018, which dismissed the Appellants' appeals.

Background

3. The First Appellant was born on 28 August 1986. The second appellant was born on 1 July 1985. They are both citizens of Nepal. The appellants were married on 28 November 2011. The appellants entered the UK on 12 September 2012, the first appellant as a student and the second appellant as her dependent partner. On 17 October 2017 both appellants applied for further leave to remain in the UK. The respondent refused those applications on 8 November 2017. The first appellant's father is a former Gurkha soldier who has retired in the UK.

The Judge's Decision

4. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Birk ("the Judge") dismissed the appeals against the Respondent's decision. Grounds of appeal were lodged and on 6 September 2018 Judge Smith gave permission to appeal stating *inter alia*

> There was an arguable error of law. This was a case which concerned the historical injustice suffered by Gurkhas generally, and the appellant's father specifically. So much was clear from the basis upon which the appellant's advanced their initial application to the respondent, the respondent's decision in relation to Mrs Thapa, and the arguments advanced by both sides at the hearing (see the record of proceedings). Yet the judge did not make a single reference to those arguments, or the authorities upon which they are based (for example Rai v Entry Clearance Officer [2017] EWCA Civ 320, Ghising and others (Ghurkhas/BOCs; historic wrong; weight) [2013] UKUT 00567 (IAC), thereby failing to resolve an issue of law which was central to the determination of the proceedings.

The Hearing

5. (a) For the appellants, Ms Nnamani moved the grounds of appeal. She told me that the Judge failed to assess whether or not there is family life between the appellants and the first appellant's father, who is a former Gurkha soldier who settled in the UK, and that the Judge failed to properly consider the proportionality of the respondent's decision.

(b) Ms Nnamani took me to [18] of the decision, where the Judge makes a finding that article 8 family life exists for the appellants. She told me that the Judge then refers to medical evidence at [22] of the decision but fails to consider the gap in the care provided to the first appellant's parents which would be created if the appellants were removed.

(c) Ms Nnamani referred me to Rai v ECO [2017] EWCA Civ 320; Ghising ((family life – adults- Gurkha policy) Nepal [2012] UKUT 160; R(Gurung) v

SSHD [2013] 1 WLR 289; and PT (Sri Lanka) v ECO [206] EWCA Civ 612. She told me that evidence had been led and submissions have been made about historical injustice, and there is no reference at all in the decision to either the caselaw or to the historic injustice arguments. She told me that because historic injustice has not been considered the article 8 proportionality assessment is fundamentally flawed. She reminded me that in the appellant's application, and in the respondents reasons for refusal letter, the respondent's policy of settlement for adult children of former Gurkhas who completed service in the brigade of Gurkhas of the British army between 1948 and July 1997 is considered, but the Judge simply does not deal with that crucial part of the appellant's case.

(d) Ms Nnamani told me that the decision is tainted by material error of law and urged me to set the decision aside.

6.(a) For the respondent, Ms Pal told me that even if the decision contains an error of law, it is not a material error. She told me that the Judge specifically found that there is article 8 family life by "*the smallest of margins*" and found that there is no financial dependency between the appellant and the first appellant's parents. She reminded me that the appellants married each other in 2011 and came to the UK in 2012. The first appellant's father did not enter the UK until 16 May 2015.

(b) Ms Pal took me through the decision and reminded me that the Judge rejected the first appellant's evidence about the degree of care that she offers her parents, and found that there are other family members living close to the first appellant's parents. She emphasised that the finding that there is no dependency between the appellant's and the first appellant's parents.

(c) Ms Pal conceded that the decision does not consider submissions which were made relying on Rai v ECO [2017] EWCA Civ 320; Ghising ((family life – adults- Gurkha policy) Nepal [2012] UKUT 160; R(Gurung) v SSHD [2013] 1 WLR 289; and PT (Sri Lanka) v ECO [206] EWCA Civ 612, but told me that, insofar as that might be an error, it is not a material error and did not impact negatively on the remainder of the decision. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) it was held that (i) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments; (ii) When an Appellant has shown that there is 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 a decision to remove is

proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware); (iii) 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; (iv) 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 SSHD/ ECO consist solely of the public interest in maintaining a firm immigration policy; (v) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (a) their family life engages Article 8(1); and (b) 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.

8. In Patel, Modha and Odedara v ECO (Mumbai) (2010) EWCA Civ 17 the Court of Appeal recognised that one could set out to compensate for a historical wrong, but one could not reverse the passage of time. Where children had grown up and embarked on lives of their own, the bonds which constituted family life would no longer be there and Article 8 would have no purchase. However, what might constitute an extant family life fell well short of what constituted dependency. Many adult children might still have a family life with parents settled in the UK, not by leave or by force of circumstance, but by long delayed right. That was what gave the historical wrong a potential relevance to Article 8 claims. That did not make the ECHR a mechanism for turning back the clock, but it did make the historical wrong potentially relevant to the application of Article 8(2). If, by the time the adult children sought entry they were no longer part of the family life of the BOC who had finally secured citizenship in the UK, the threshold of Article 8 would not be crossed and the proportionality of excluding them would not be an issue. If they came within the protection of Article 8(1) however, the balance of factors determining proportionality for the purposes of Article 8(2) would be influenced by the historical wrong, perhaps decisively.

9. In PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 it was held that some tribunals appeared to have read Kugathas [2003] EWCA Civ 31 as establishing a rebuttable presumption against any relationship between an adult child and his parents or siblings being sufficient to engage Article 8. That was not correct. Kugathas required a fact-sensitive approach, and should be understood in the light of the subsequent case law summarised in Ghising (family life – adults – Gurkha

policy) [2012] UKUT 160 (IAC) and Singh [2015] EWCA Civ 630. There was no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 nor was there any requirement of exceptionality. It all depended on the facts. The line of case-law was again considered in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 (in the context of the adult son of a former Gurkha soldier).

10. At [18] the Judge clearly makes a finding that article 8 family life exists. It does not matter that the Judge qualified that finding by saying that

> Family life is established only by the smallest margin.

The Judge's finding is that article 8 family life exists. That finding should have led the Judge to consider the Gurkha policy and historic injustice because it is an undisputed fact that the first appellant's father is a Gurkha veteran who settled in the UK in 2015. The Judge should have considered the Gurkha policy and historic injustice because submissions were made on historic injustice and the caselaw set out above was cited to the Judge.

11. Consideration of historic injustice in this case is a crucial part of the proportionality assessment and it is missing from the decision. That is a material error of law. The error is material because consideration of historic injustice may result in a different outcome and because, without consideration of historic injustice, the decision is incomplete.

12. Because the decision is tainted by material error of law I set it aside. I can substitute my own decision.

The facts

13. The second appellant is the first appellant's husband. Both appellants are citizens of Nepal. The appellant were married in November 2011 and came to the UK in September 2012. The first appellant came to the UK as a student, the second appellant came as the first appellant's dependent partner.

14. The first appellant's father is a former Gurkha soldier who retired to the UK in May 2015. It was he who told both appellants to come to the UK so that the first appellant could study. He funded the appellants' journey to the UK and funded the courses of study taken by the first appellant. The appellants have been financially dependent upon the first appellant's father throughout their time in the UK.

15. Neither of the appellants can satisfy the requirements of annex K of the immigration rules, but family life within the meaning of article 8(1) of the 1950 convention exists between the first appellant and her father and between the first and second appellants.

16. If it had been possible for the appellant's father to enter the UK on discharge from the army, he would have come to the UK then, and he would have brought his entire family with him. The prospect of entry to the UK only opened up to the appellant 's father when annex K was introduced to the rules in 2015.

The Immigration Rules

17. It is conceded that the appellants cannot meet the requirements of annex K to the Immigration Rules. The appellants cannot meet the requirements of appendix FM. Because of their ages and the length of time the appellants have been in the UK the appellants cannot meet the requirements of paragraph 276ADE(1)(i) to (v). It is not argued that there are any obstacles to reintegration in Nepal, so that the appellants cannot meet the requirements of paragraph 276ADE(1)(vi) of the rules.

Article 8 ECHR

18. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed..."

19. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8
(ii) If so, has the right to respect for this been interfered with
(iii) If so, was the interference in accordance with the law
(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

20. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

21. I remind myself of what is said in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), in Patel, Modha and

Odedara v ECO (Mumbai) (2010) EWCA Civ 17**,** in PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 and in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320.

22. On the facts as I find them to be the first appellant is still dependent upon her parents financially. The first appellant's parents provide her accommodation and her income. On the facts as I find them to be, it is because of an acknowledged historical injustice that the first appellant and her parents did not come to the UK together before 2015. I therefore find that family life within the meaning of article 8 of the 1950 convention exists.

23. As I find that article 8 family life exists, the burden of proof moves to the respondent. Section 117B of the 2002 tells me that immigration control is in the public interest, but that is not all that there is to assessment of proportionality. The appellant is not financially independent, those are factors which I must weigh against the appellant. Against those I weigh the historical injustice as discussed in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) & Gurung and others [2013] EWCA Civ 8.

24. Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) tells me that

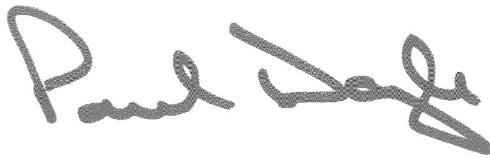
> where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the SSHD/ ECO consist solely of the public interest in maintaining a firm immigration policy

25. On the facts as I find them to be the first appellant would have settled in the UK with her parents as a child were it not for the historical injustice which is recognised by both the respondent and the courts. The respondent's decision renders the first appellant a secondary victim to that injustice. When I consider all of these matters I can only find that the respondent's decision is a disproportionate breach of the right to respect for family life. I find that the Decision appealed against causes the United Kingdom to be in breach of the law or its obligations under the 1950 Convention.

26. The first appellant's appeal is allowed on article 8 ECHR grounds. Family life clearly exists between the first and second appellants. They are married. The second appellant's previous grant of leave to remain in the UK had been entirely dependent on the leave granted to the first appellant. The first appellant's appeal succeeds. If the second appellant's appeal does not succeed, then separation will be forced on the appellants. That separation will be a disproportionate breach of the second appellant article 8 rights.

CONCLUSION

27. The decision of the First tier Tribunal promulgated on 19 June



or of law. I set it aside.

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29. The appeals are allowed on article 8 ECHR grounds.

Signed Date 29 October 2018
Deputy Upper Tribunal Judge Doyle