Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/02846/2013
OA/02845/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 March 2014	**On 28 April 2014**

Before

MR JUSTICE JEREMY BAKER
UPPER TRIBUNAL JUDGE DAWSON

Between

MR SURAJ KUMAR GURUNG
MR SURENDRA GURUNG

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms A Jaja, Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr C Avery, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by Surendra Gurung and Suraj Kumar Gurung against the decision of the First-tier Tribunal promulgated on 2 January 2014 which refused their appeal against the determination of the Secretary of State for the Home Department not to grant them leave to enter the United Kingdom as the dependants of Bel Bahudur Gurung.

2. Bel Bahadur Gurung is a former Gurkha soldier and one of the issues in this appeal concerns the "historical injustice" which is now recognised that these soldiers may have suffered as a result of the differential immigration provisions applied to those soldiers as compared to other non-British commonwealth members of the British Armed Services. That arose because for a number of years Gurkha veterans were treated less favourably that comparable non-British commonwealth soldiers who had served in the British Army, in that the Secretary of State had a policy outside the Immigration Rules which allowed the latter group of individuals who had been serving the British Army to enter the United Kingdom, whereas Gurkhas who were in a similar position were not included in that policy. Following a number of representations made to HM Government this situation changed in 2004. As a result of which the Immigration Rules were altered to enable Gurkha veterans with at least four years' service who had been discharged from the Armed Services within the past two years to apply for settlement in the United Kingdom.

3. In addition, the Secretary of State introduced a policy outside the Rules under which Gurkhas were permitted to settle in the United Kingdom even if they had been discharged before 1 July 1997 an/or more than two years prior to the date of the application.

4. Annex A set out part of the discretionary arrangements outside the Rules for former Gurkhas discharged before 1 July 1997; Annex A stated:

> "Dependants
>
> Discretion will normally be exercised and settlement granted in line with the main applicant for spouses, civil partners, unmarried and same-sex partners and dependant children under the age of 18.
>
> Children over the age of 18 and other dependant relatives will not normally qualify for the exercise of discretion in line with the main applicant and would be expected to qualify for leave to enter or remain in the United Kingdom under the relevant provisions of the Immigration Rules, for example under paragraph 317, or under the provisions of Article 8 of the Human Rights Act. Exceptional circumstances may be considered on a case by case basis…….".

5. The question as to the weight that should be attached to this historic injustice, where it has been established, was the subject of a number of decisions by tribunals, and a number of those decisions came to be considered by the Court of Appeal in *Gurung & Others v Secretary of State for the Home Department [2013] EWCA Civ 8.* At paragraph 35 of the judgment, The Master of the Rolls said that, :

> "It is accepted on behalf of the SSHD that the historic injustice is a relevant factor to be taken into account when the proportionality balancing exercise is undertaken. The question is what weight should

> be given to it..... The present appeals raise the point of principle whether the historic injustice suffered by Gurkhas should be accorded limited or substantial weight in the Article 8(2) balancing exercise."

6. There then followed discussion about the differential factors between Gurkhas and British overseas citizens who had also suffered an historic injustice, and the fact that some tribunals had held that less weight should be given to the historic injustice suffered by Gurkha veterans, than that given to British overseas citizens. However, the Court of Appeal concluded that the differential was inappropriate, and at paragraph 42 The Master of the Rolls said that:

> "..... lf a Gurkha can show that, but for the historic injustice, he would have settled in the United Kingdom at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate for an adult child to join his family now."

As a result of this decision, the Upper Tribunal gave further consideration to one of the cases which had been the subject of the earlier appeal to the Court of Appeal, in *Ghising & Others v SSHD [2013] UKUT 00567 (IAC).* At paragraphs 59 and 60 of the determination it was said that :

> "... 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 United Kingdom long ago is established, this will ordinarily determine the outcome of the proportionality assessment and determine it in an appellant's favour... 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."

7. The Upper Tribunal observed that if there were other factors which were relevant and weighed against the applicant in the proportionality assessment under article 8, then if they were of sufficient weight they could justify the refusal of leave to enter. However, at paragraph 60, the UT concluded:

> "..... 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."

8. The situation in the present case is that the appellants' father, Bel Bahadur Gurung, served in the Gurkha regiment of the British Army for fifteen years and was discharged on 22 June 1993. He was married and had three children, the eldest being Surendra Gurung who is presently

aged 24, born on 6 June 1989, the second son was Suraj, now 23 years of age, born on 24 January 1991 and the youngest son Dipesh, who was born on 23 July 1999 and now 13 years of age. A joint application was made for the father and his family to enter the United Kingdom in order to settle, under the policy outside the Rules, with his wife and children as his dependants. So far as the father, his wife and the youngest child are concerned, the application was granted by the Secretary of State on 24 August 2012. However, the application of the elder two children was refused by the Entry Clearance Officer on 4 December 2012. The decision letter stated that:

> "I have also taken account, as I must, of the requirements of the Human Right Act, specifically Section 6 and the incorporation of the European Convention on Human Rights and Responsibilities into my consideration of your application, specifically in your case Article 8. I note that you are over 18 and an adult. I note that your relationship per se is no guarantor of acceptance that Article 8(1) of the Convention is engaged. It requires more than the acceptance of the normal emotional ties to be so. I have seen nothing that would lead me to conclude that there are particular bonds in your case that would lead to an engagement of Article 8(1). I am mindful of Article 8 jurisprudence and recent determinations in the Upper Tribunal in the United Kingdom including, when dealing with a proportionality test, the addressing of an historical injustice. I note the judge (UKUT IAC [2012] RG Nepal) indicated that this had substantially less weight than that to be afforded to a British national. I also note the need for fair and effective immigration control and that you do not qualify under the Immigration Rules and the margin of appreciation afforded to me. In my assessment of Article 8, I find that Article 8(1) is not engaged and so there is no need to assess proportionality.
>
> However, even were Article 8(1) to be engaged, I am not satisfied that you have provided any evidence that indicates to me that you are not currently capable of living an independent adult life. It was your sponsor's decision to split the family in the full knowledge that their adult child would not automatically qualify to join them. You have completed your studies which will improve your opportunities of finding employment in Nepal. On that basis this application fails. I consider that refusing this application is proportionate in the exercise of firm immigration control."

9. An appeal was made against the decision, which was considered by the Entry Clearance Manager, who confirmed the earlier decision. These decisions were the subject of the appeal to the First-tier Tribunal.

10. The First-tier Tribunal found, firstly, that the two applicants had not established that they had family life with the remainder of their family under Article 8(1). Secondly, that even if family life had been established,

the decision of the Entry Clearance Officer was proportionate with the interference with their Article 8 right.

11. Ms Jaja, who appears on behalf of Surendra Gurung and Suraj Gurung submits that: firstly, the First-tier Tribunal were wrong to conclude that family life had not been established and; secondly, the First-tier Tribunal misinterpreted and misapplied the latest jurisprudence concerning the weight that should be given to the historic injustice in assessing the issue of proportionality under article 8.

12. We have been helpfully assisted by Mr Avery on behalf of the Secretary of State. In relation to the question whether the appellants had established family life, although he did not entirely concede the point, he accepted that the First-tier Tribunal had not take into account the latest jurisprudence concerning the factors to be taken into account when considering whether or not family life has been established under Article 8(1); such that this was a matter which was open to be reviewed by us. In relation to the second ground, he very properly conceded that the First-tier Tribunal had not properly understood the Court of Appeal's decision in *Gurung,* and in particular the weight that should be given to any historical injustice, if it was able to be established. In those circumstances he accepted that the decision of the First-tier Tribunal could not be properly supported and both parties have invited us to re-determine these issues.

13. In dealing with the issue as to whether the appellants were able to establish family life under article 8(1), the First-tier Tribunal referred to Kugathas [2003] EWCA Civ 31. However the jurisprudence in this area has progressed, and a helpful review of it is set out in the determination of the Upper Tribunal in the previous *Ghising* decision, reported at *[2012] UKUT 160 (IAC).* We note that in the *Gurung* case in the Court of Appeal, at paragraph 46, the Master of the Rolls specifically endorsed this review of the jurisprudence which is to be found between paragraphs 50 to 62 of the earlier decision. We do not consider it necessary to refer to all of the authorities which were carefully considered in the earlier decision. However we do note that at paragraph 56, Lang J observed that *Kugathas* may have been interpreted too restrictively in the past and now ought to be read in the light of subsequent domestic and Strasbourg decisions.

14. The most recent of these decisions was *AA v United Kingdom (Application No.8000/08)*_a decision of the European Court of Human Rights and in particular at paragraph 49,where it was said that:

> "An examination of the court's case law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'."

15. As was said in the earlier *Ghising* determination at paragraph 61, AA appears to support that proposition that one of the factors which could be

taken into account in relation to the issue of "family life," was whether or not the adult child is still living with the parents upon whom he is alleged to be dependent. If so, that would be a positive factor to be taken into account in his favour.

16. The evidence that was before the Entry Clearance Officer at the time when the decision was made in the present case included the witness statement of Bel Bahadur Gurung dated 14 August 2012, which stated that he was living in Nepal with his wife and three children and that he was entirely responsible for the financial support of all his family. In particular he said at paragraph 17:

> "My two adult dependent children are unmarried, have never been employed and are not leading independent lives. They are still very much part of the family unit. My children have always been financially dependent on me. I fund their education and pay for their living expenses."

He then set out the personal circumstances in respect of each of the three children noting that so far as Surendra was concerned, he was attending a college together with Suraj Kumar Gurung and that he suffered ill-health. He also stated that it was his intention to settle in the United Kingdom with the whole of his family.

17. We have reviewed the decision of the First-tier Tribunal and in particular paragraph 21, where the finding was made that family life under Article 8(1) had not been established. We have already noted that the only reference to previous authorities was the decision of *Kugathas.* On this basis although the First-tier Tribunal correctly made reference to the need to consider the strength of the emotional ties between the relevant family members, it did not go beyond this factor and did not take into account other factors which the more recent jurisprudence suggest may also be of relevance. In our judgment the First-tier Tribunal ought to have considered the issue of family life more broadly and in particular ought to have considered the fact that not only were the two applicants dependent financially upon their father, but in particular they all remained as a single family unit living together in Nepal. If the Tribunal had done so we consider that it is likely, as we now determine that, looking at the evidence that was available to the Entry Clearance Officer, "family life" persisted between the two appellants and their parents, and in particular with their father. In reaching this view we consider that the fact that the family still remained as an inter-dependable single family unit, was a significant factor to be taken into account and one which does not appear to have been given sufficient weight by the Entry Clearance Officer. In those circumstances we are satisfied that both of these applicants have established that at the relevant time they had family life with their father and other family members in Nepal.

18. We have looked with care at the First-tier Tribunal's decision and do not find it easy to assess whether or not that Tribunal asked themselves the correct question when considering the issue as to whether the "historic injustice" applied in this case. The matter was referred to at paragraph 18 of the decision of the First-tier Tribunal where it was stated that:

> "... I find however that there is no credible evidence before me that when the sponsor was discharged from the army in 1993 he did not understand that he would not have a right to settle in the United Kingdom at that time……".

With respect that is not the question that was required to be considered. The question was whether there was evidence that the father had an intention to come to the United Kingdom when he left the army had it not been for the prevailing policy. By the time the appeal came before the First-tier Tribunal, it had the benefit of a witness statement from Bel Bahadur Gurung on this point. As this was evidence of his intent at the time of his discharged from the army, it was evidence upon which the Tribunal were entitled to take into account.

At paragraph 17 of that statement the father said:

> "Had I been allowed to apply for settlement in the United Kingdom on discharge I would have applied with my wife and children. They would have then qualified as my minor dependants. However I was never given the opportunity and hence my children is [sic] now being separated from their parents who are present and settled in the UK."

19. It is apparent from what we have said that this issue does not appear to have been properly addressed by the First-tier Tribunal. In re-determining the matter, we have reached the view that this evidence is credible and there are no counter-veiling reasons to doubt its veracity. On this basis we conclude that at the date of when the original decision was made in this case, the appellants had established that the historic injustice applied to their situation.

20. We then turn to the third matter, which is the effect that that the establishment of this factor has upon the question of proportionality. Despite their apparent conclusion that the historic injustice was not established in this case, the First-tier Tribunal considered the relevance of this potential factor to the issue of proportionality at various parts of their determination. It reviewed a number of the authorities, including the earlier *Ghising* case at paragraph 14 and then referred to the Court of Appeal's decision in *Gurung* at paragraph 16, stating that:

> "The court held that normally questions of weight are a matter for the decision-maker and that it is relevant to consider whether the historic injustice suffered by Gurkhas should be accorded limited or substantial weight in an Article 8(2) balancing exercise".

Although the Tribunal were correct in identifying the issue that was before the Court of Appeal, we cannot find reference in its determination either to the answer that was provided by the Court of Appeal, nor the application of it to the present case; namely, that if family life has been established and the historic injustice applies, then in considering the article 8(2) proportionality issue in relation to an adult dependent child, in the absence of other counter-veiling factors, it is a strong reason for holding that it would be proportionate to permit the adult child to join his family in the UK. In these circumstances, as Mr Avery has very properly conceded, this aspect of the First-tier Tribunal's decision cannot be maintained and we have re-determined the matter.

21. One matter which was raised by Mr Avery was that since the original decision by the Entry Clearance Officer, the Appellants' father together with his wife and Suraj Gurung have moved to Brunei, so that his father can take up employment, leaving Surendra Gurung and the youngest brother in Nepal; the latter being at boarding school. Mr Avery submits that this is a matter which ought to be taken into account by us. This is a state of affairs which postdates the time when the decision by the Entry Clearance Officer was made, and we are obliged to consider the situation at that time. However, even if this is a matter which ought to be taken into account, we do not consider that it is of such substance that it would be sufficient to weigh against the significance of remedying the historic injustice in this case. In reaching this conclusion we note that in his witness statement the Appellants' father provides an account of why it is that he has taken this course of action, namely to provide an income in order to support his family.

22. In conclusion, we are satisfied that each of the Appellants have established that they have family life together with the father and the rest of the family, and in the absence of sufficient counter-veiling factors, the significance of the historic injustice which applies to their situation is of such strength that it ought to have been reflected by the Secretary of State concluding that it was disproportionate under article 8(2) to have separated the family, including the two adult applicants. Accordingly we allow the appeals of each of these Appellants and set aside the determination of the First-tier Tribunal. We remake the decisions in the appeals which we allow against the decision of the Entry Clearance Officer and direct that entry clearance be promptly issued to the appellants.

Signed Date

The Honourable Mr Justice Jeremy Baker
Sitting as a Deputy Judge of the Upper Tribunal