Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/14344/2013 & OA/14345/2013

THE IMMIGRATION ACTS

Heard at Field House	Determination Promulgated
On 14 October 2014	On 7 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DRABU CBE

Between

MISS SITA GURUNG AND MISS BINA GURUNG

Appellant

and

ENTRY CLEARANCE OFFICER, NEW DELHI

Respondent

(ANONYMITY DIRECTION NOT MADE)

Representatives
For the Appellant: Mr R Mobbs of Counsel instructed by Howe & Co, Solicitors
For the Respondent: Mrs Alice Holmes, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are sisters and are nationals of Nepal, having been born on 19 February 1988 and 8 September 1989 respectively. They were refused entry clearances to join their parents in the United Kingdom. The applications were refused on 13 February 2013. In refusing the applications the respondent stated that he had considered the applications as adult dependent relatives under Paragraph EC-DR 1.1 of Appendix FM of the Immigration Rules as well as the Home Secretary's policy as outlined in IDI Chapter 15 Section 2A 13.2 as amended on 12/03/2010. The respondent had also gone on to consider but refused

the applications under Article 8 of the ECHR. It is fair to say that the reasons for the decisions in respect of both appellants are fairly long but essentially the same.

2. Material facts of the appellants are as follows: Their father is Mr Gurung Krishna Bahadur, an ex-Gurkha soldier. The sponsor was born in Lamjung, Nepal in 1948. He was granted indefinite leave to enter the United Kingdom on 1 July 2009 under the Gurkha Policy as he had been a long serving member of the British Gurkha Regiment. He had served in HM Forces as a Gurkha veteran for over 17 years. He then applied for his wife and minor son for entry clearances in 2010 and they were granted indefinite leave to enter on 5 May 2010. The sponsor and his wife travelled to the UK on 9 June 2010. The sponsor had been previously married but his first wife who had borne him four children including the appellants and one son and one other daughter had died in 2002. The son is married and lives in Nepal. The daughter lives in Hong Kong. From his present marriage the sponsor has two children – Passang a daughter born on 5 December 2008 and Kusum born in 2010. Due to financial circumstances the sponsor was not able to apply for entry clearances for the appellants at the same time as his wife and two young children. The appellants live in Kathmandu where they are studying for their degree courses. Their brother Ashok cultivates a small piece of land and does not take care of the appellants.

3. The sponsor and his wife are concerned for the safety of their daughters – the appellants as they do not have anyone to look after them and their safety causes them worry. The sponsor visits the appellants once a year. The appellants are financially dependant on him and are unmarried and unemployed.

4. The above facts have been accepted by Judge Mailer who heard their appeals against the respondent's decision at Richmond on 2 June 2014. He dismissed the appeals for reasons set out in the determination promulgated on 11 July 2014.

5. Judge Mailer noted that Ms Patterson representing the appellants before him conceded that the appeals could not succeed under the Rules but would succeed under the Policy for Gurkhas and Article 8. Judge Mailer rejected the arguments advanced by Ms Patterson that the appellants qualified under the Policy as well as under Article 8. The Judge referred to the decision in Ghising and Others [2013] but distinguished it on facts as in the present appeals the appellants were not in existence as at the date of their father's discharge in 1983. The Judge concluded that the "evidence does not show that they would have come to the UK with their father but for the injustice that prevented the latter from settling here on completion of his military service. They had not been born yet."

6. On 22 August 2014 the appellants were granted permission to appeal to the Upper Tribunal by Judge Levin, a Judge of the First Tier as in his view the grounds supporting the application disclosed arguable errors of law in the determination.

7. At the hearing before me, Mr Mobbs of Counsel took me through the grounds of the application and the determination of Judge Mailer. He argued that the Judge had erred in law in distinguishing the legal principles set down in the decision of Ghising and had he not done so he would have concluded that the appellants qualified for entry. He submitted that these two appellants had become victims of

historical injustice that the Home Secretary had cured through the Policy on Gurkhas. To suggest as had Judge Mailer that the injustice suffered here is "speculative" is irrational as the sponsor's evidence which the Judge had not found incredible or implausible clearly established that in 1983 he would have applied to come to the UK if he had been permitted to do so and the appellants would have been in the United Kingdom too. The Counsel also wanted me to note that the sponsor's employment as well as his conduct has been exemplary. Mrs Holmes in response said that the determination of Judge Mailer was "detailed" and that "the findings that he had made were open to him."

8. I am in agreement with Mrs Holmes in her description of Judge Mailer's determination. It is a detailed and very well written determination. But that is how far our agreement goes.

9. In his attempt to distinguish the legal principles that underpinned the decision in Ghising, Judge Mailer, with great respect, focussed too much on the facts of that case rather than the principles of law established by the case. Paragraphs 59 and 60 of the Ghising decision are very pertinent. In paragraph 59, the Upper Tribunal said, "That said, we accept Mr Jacobs' submission that where Article 8 is held to be engaged and the fact tat 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 exercise and determine it in the 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 BOC's:

> "were prevented from settling in the UK. 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 will carry significant weight, on the Appellant's side of the balance, and is likely to outweigh matters relied on by the Respondent, where these consist solely of the public interest just described."

10. Where Judge Mailer made a material error in law is that having found that the facts f this case engaged Article 8 of the ECHR, the balance in proportionality exercise went in favour of the Respondent. The considerations that he allowed to weigh heavy on his mind in carrying out the proportionality exercise had little or nothing to do with the historic injustice which would and should have vindicated their Article 8 rights to respect for family life.

11. For that reason I set aside the decision to dismiss the appeals made by Judge Mailer and remake the decision.

12. It is fair to say that facts pertinent to the appeals are not in dispute. Bearing in mind all the relevant facts and the law, including the absence of any countervailing factors except the maintenance of firm immigration control, I have concluded that these appeals should be allowed because irrespective of the adult hood of the appellants, Article 8 is properly engaged as Judge Mailer had found but unlike him I have found that it is a disproportionate interference in their family life rights to deny them entry as dependent daughters of a Gurkha veteran.

13. Appeals of both appellants are allowed under Article 8 of the ECHR.

K Drabu CBE
Deputy Judge of the Upper Tribunal.
6 November 2014