



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/32153/2013

THE IMMIGRATION ACTS

**Heard at North Shields
on 30th October 2014**

**Determination
Promulgated
On 31st October 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MAHENDRA TAMANG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Ahmed instructed under the Direct Access Scheme (advocacy only).

For the Respondent: Mr Mangion – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. Following a hearing at North Shields on 9th September 2014 the determination of the First-tier Tribunal which dismissed the Appellant's appeal was set aside, for the reasons set out in the error of law finding and directions document dated 12th September 2014. The matter returns to the Upper Tribunal today for the purposes of a substantive hearing to allow the decision to be remade. The scope of the hearing is limited to the question of whether family life recognised by Article 8 (1) exists and the proportionality of the decision.
2. The Appellant was born on 29th December 1986 and is a national of Nepal. His father is a veteran of the Brigade of Gurkhas who was discharged in September 1995 after more than 12 years of service

with an exemplary record. It is his evidence that had he been permitted to do so he would have applied for leave to enable him to settle in the United Kingdom upon discharge. His evidence is that during the time of his service he entered the United Kingdom on four separate occasions, one of which was for the purpose of receiving medical treatment by way of spinal decompression surgery for prolapsed intervertebral discs, an injury sustained as a result of his military service.

3. As the appellant's father was unable to apply for settlement upon discharge he travelled to Hong Kong where he obtained employment which he was able to use to support his family unit which was composed of his wife, his son the appellant, and a daughter, who remained in Nepal. His evidence was that his wife would visit him and stay on occasions in Hong Kong although thereafter return to Nepal to continue to care for their children.
4. In 2009, following a well-publicised campaign fronted by a celebrity in the entertainment industry, the law was changed to remedy what is now accepted was an historic injustice to allow members of the Gurkha Regiment who retired prior to 1997 to apply for settlement in recognition of their service to the United Kingdom. The appellant's father made such an application and in January 2010 was granted entry clearance. He entered the United Kingdom in July 2010 with his wife (the appellant's mother), and shortly thereafter the Appellant joined them from within the UK and has lived with them in the family household since. The appellant's father's evidence is that he would have made the application in 1995, if permitted, at which point the Appellant would have been a dependent child under the age of 18 and therefore eligible for entry along with his parents.
5. The evidence shows that the Appellant remained in the family home in Nepal until entering the United Kingdom on 24th September 2009 with leave as a Tier 4 (General) Student valid until 3rd November 2010.
6. The evidence considered by the Upper Tribunal, both written and oral, clearly demonstrates that the Appellant remained within the family unit in Nepal until he came to the United Kingdom. The cost of his studies both in terms of course fees and maintenance was provided by his parents, indicating continued dependence upon them. He undertook casual work within a local fast food outlet permitted by the terms of his student visa but has not worked since joining his father's household and therefore remains dependent upon his father who is employed and earning sufficient income to support the family unit in the United Kingdom.
7. The Appellant's sister later applied for entry clearance, as she remained in Nepal, which was refused and which has been subject of

an appeal before the First-tier Tribunal heard in October 2014. The determination of that Tribunal is still awaited.

8. Whether family life recognised by Article 8 exists is a question of fact. One of the reasons it was found the judge of the First-tier Tribunal had erred in law was as a result of a failure to apply the correct legal test, including a failure to consider relevant European jurisprudence including AA v United Kingdom (Application no. 8000/08) in which the European Court of Human Rights held that Strasbourg jurisprudence tended to suggest that the applicant, a young adult who resided with his mother and had not yet founded a family life of his own, could be regarded as having “family life” for the purposes of Article 8(1). The Court, however, found that it was not necessary to decide whether this was the case for as Article 8 protected the right to establish and develop relationships with other human beings and could embrace aspects of an individual's social identity, it had to be accepted that the totality of social ties between settled migrants and the community in which they were living constitute a part of the concept of private life within the meaning of Article 8 and that in practice the factors to be examined when assessing proportionality of the deportation measures were the same regardless of whether family or private life was engaged.
9. I accept the Appellant is now an adult but it has not been shown on the evidence that he has established an independent household of his own away from that of his parents. Whilst that household initially existed in Nepal, once his father and mother came to the United Kingdom and re-established their lives within this country that became the family home at which the Appellant was reunited with them. I accept Mr Mangion's submission that it appears no enquiries were undertaken to establish whether the Appellant was able to seek employment as a result of the fact his student leave will have continued by virtue of section 3C of the Immigration Act, and that there is merit in support of a finding that the situation that does exist, with the Appellant in the family household and dependent upon his parents, has only arisen as a result of his belief he was unable to work, and is therefore a situation that only exists as a result of his lack of status permitting him to remain and to obtain proper employment in the United Kingdom. That may be the case, but as the facts clearly indicate ongoing dependence upon his family, the lack of an independent household, a chronology showing that his studies in the United Kingdom flowed from his development within his family and a desire in him and his family for him to study in this country as a result of the reputation the educational services have here, it has not been established that his arriving in the United Kingdom and activities since are those of an individual who has established an independent life away from the family. The fact they are situation specific as a result of the status is relevant, however, to the proportionality of the decision.

10. I accept that the Appellant has established private life recognised by Article 8(1) in United Kingdom too. Although any private life established as a student will be tenuous as result of the temporary nature of such status, since completing his studies and rejoined his father's household the Appellant has developed a private life within that household and with friends within the community in the United Kingdom.
11. I therefore accept that family and private life recognised by Article 8(1) has been shown to exist with his mother and father and between them and him in the United Kingdom. The Upper Tribunal is only referring to Article 8 (1) ECHR in this context as it is accepted that the Appellant is unable to succeed under the Immigration Rules which is a relevant factor when considering proportionality.
12. In relation to the proportionality argument, as no issues arose in relation to any other of the Razgar questions, if this was a case of an individual who attended as a student but decided thereafter that he wished to remain because his parents had themselves entered with status granted independently to them, the case of the Secretary of State would be considerably strengthened. This is, however, not such a case.
13. As stated above, the Appellant's father is a former member of the Gurkha Brigade. His evidence, which I accept, is that had it been possible he would have applied for leave to enter the United Kingdom in 1995 and brought the members of his family with him. The only thing that prevented such a course of action was because the law did not facilitate such an application and had such an application been it would have been refused for this reason. As soon as he was able to make such an application he did and was granted entry and is now settled in this country. The difficulty is that by the time that application was approved his children were adults. An important case when considering issues such as those which have arisen in this appeal is that of R(on the application of Sharmilla Gurung and others) v SSHD [2013] EWCA Civ 8. In this case the Court held that the historic injustice suffered by Gurkhas was only one factor to be weighed against immigration control under Article 8. It was not necessarily determinative. The fact that the right to settle enjoyed by Gurkhas was less secure than that enjoyed by the BOCs was a relevant factor but although the weight to be given to the historic injustice to Gurkhas was not as strong as that given to BOCs, the UT had not been correct to state that the weight to be given was generally substantially less in the Gurkha cases. If a Gurkha could show that, but for the historic injustice, he would have settled in the UK at a time when his dependent (now) adult child would have been able to accompany him as a dependent minor child, that was a strong reason for holding that it was disproportionate to permit the adult child to join his family now.

14. Also, in [Ghising and others \(Ghurkhas/BOCs: historic wrong: weight\) \[2013\] UKUT 00567 \(IAC\)](#) it was held that:

wrong in less than Overseas **EWCA** effect of proof (i) In finding that the weight to be accorded to the historic Ghurkha ex-servicemen cases was not to be regarded as that to be accorded the historic wrong suffered by British citizens, the Court of Appeal in **Gurung and others [2013] Civ 8** did not hold that, in either Gurkha or BOC cases, the the historic wrong is to reverse or otherwise alter the burden that applies in Article 8 proportionality assessments;

and interference that a decision practice, their (ii) When an Appellant has shown that there is family/private life the decision made by the Respondent amounts to an with it, the burden lies with the Respondent to show to remove is proportionate (although Appellants will, in bear the responsibility of adducing evidence that lies within remit and about which the Respondent may be unaware);

the burden BOCs, the historic given (iii) What concerned the Court in **Gurung** and others was not of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of wrong suffered by Gurkha ex-servicemen should be substantial weight;

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

cases engages come to the that Respondent can in maintaining a removal or the appropriate a bad be the (v) It can therefore be seen that Appellants in Gurkha (and BOC) will not necessarily succeed, even though (a) their family life Article 8(1); and (b) the evidence shows they would have United Kingdom with their father, but for the injustice prevented the latter from settling here earlier. If the point to matters over and above the public interest firm immigration policy, which argue in favour of refusal of leave to enter, these matters must be given weight in the balance in the Respondent’s favour. Thus, immigration history and/or criminal behaviour may still sufficient to outweigh the powerful factors bearing on the Appellant’s side of the balance.

15. By reference to that guidance I make the following findings:

i. That Article 8 is engaged both in relation to private and family life.

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Appellant.
- ii. That but for the historic wrong/injustice the Appellant would have been settled in the United Kingdom long ago as his father have made a settlement application upon cessation of his service at which point he would be entitled to bring his children with him, which would have included the Appellant.
- iii. That the legitimate aim relied upon by the Secretary of State, set out in the refusal notice, is based upon the public interest in maintaining a firm immigration policy and an assertion that the facts of the case do not satisfied the requirements for settlement in Chapter 15, Section 2A - Person seeking settlement: HM Forces, of the Immigration Directorate Instructions of December 2013.
- iv. That the fact family life engages Article 8 (1) and the historic injustice argument is established, such that it is prevented the Appellant from settling here earlier, is not determinative.
- v. That having assessed both competing arguments and all the material provided, that the Respondent has failed to prove the decision is proportionate to the public interest in maintaining a firm immigration policy. In this respect Mr Mangion confirmed in response to a specific question from the Bench that there were no countervailing factors that he was relying upon in seeking to argue otherwise.
- vi. That having weighed the competing arguments, the factor which tipped the scales in the Appellant's favour sufficient to outweigh the case advanced by the Secretary of State is the historic wrong, which when combined with the strengthened of the family life that exists, leads to a finding that the Secretary of State has not discharged the burden of proof upon her to the required standard to show that the decision is proportionate. The appeal shall therefore be allowed.

Decision

16. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

17. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 30th October 2014