



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02007/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Determination

On 13 June 2017

Promulgated

On 14 June 2017

Before

Deputy Upper Tribunal Judge MANUELL

Between

**Mr RAJESH GURUNG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Washam, Counsel
(instructed by N C Brothers & Co)

For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Dineen on 28 April 2017 against the determination of First-tier Tribunal Judge Birk who had dismissed the appeal of the Appellant seeking settlement as the dependant of an ex Gurkha soldier on Article 8 ECHR grounds. The decision and reasons was promulgated on 11 November 2016.
2. The Appellant is a national of Nepal. It was accepted that he was the son of a former soldier in the Brigade of Gurkhas. The Appellant's father is deceased and his widow has settled in the United Kingdom. The judge found that the Appellant remained his parents' dependant, was living in the family home in Nepal where his parents (latterly, his mother) spent time each year and that family life continued in Article 8 ECHR terms. The judge nevertheless dismissed the appeal because she found that there were no compelling circumstances, as the Respondent had applied her own policy which took sufficient account of the "historic wrong" and the Appellant's depression was not such as to have caused him to seek treatment.
3. Permission to appeal was granted because it was considered that the judge had erred was arguable that the judge had erred in her approach to Article 8 ECHR proportionality by failing to consider the "historic wrong" principle for herself, notwithstanding the Secretary of State's exercise of discretion.
4. Standard directions were made by the tribunal. No rule 24 notice was filed by the Respondent.

Submissions

5. Mr Wilding for the Respondent candidly accepted that the determination could not be defended. The judge had found that there was family life for Article 8 ECHR purposes, and most importantly had unchallenged evidence before her that the Appellant would have settled in the United

Kingdom with his father much earlier had he been able to do. The judge had materially erred by failing to apply Ghising (Gurkhas/BOC: historic wrong: weight) [2013] UKUT 00567 (IAC) to those findings. Immigration control had to give way where there was no other legitimate aim being pursued for Article 8.2 ECHR purposes. No other legitimate aim had been identified by the judge. There was no objection by the Respondent to the onwards appeal's being allowed, and the original decision remade and allowed.

6. Ms Waghman for the Appellant was content with this approach and wished to add nothing further.

Material error of law finding

7. In the tribunal's view, the grant of permission to appeal had identified precisely the error into which the judge had inadvertently fallen. This is an area of Article 8 ECHR law which can often seem far from straightforward. It was right that Mr Wilding helpfully indicated immediately that the onwards appeal must be allowed and the tribunal accepts his submissions to such effect.
8. The decision and reasons was careful, and there was no suggestion that the judge's factual findings were deficient. Unfortunately, the judge did not mention Ghising (above). There are other cases with a similar or the same name and it may be that the correct and relevant citation was not given to the judge: the tribunal could not identify any corresponding note of any relevant submission in the neat and legible record of proceedings.
9. Again as Mr Wilding submitted, had the correct Ghising (above) been applied to the judge's findings of fact, the only possible outcome would have been that the appeal should have been allowed.

Appeal remade

10. Little needs to be added. A material error of law has been identified as noted above. The judge's factual findings

Number: HU/02007/2015

were sufficient and stand. This appeal must be remade on the basis of those findings. Adult dependency and corresponding family life having been found to exist on an unusual set of facts, the Gurkha “historic wrong” outweighs immigration control for Article 8 ECHR proportionality purposes. The appeal is allowed. There was no suggestion of any need for anonymity.

DECISION

The appeal to the Upper Tribunal is allowed

The making of the previous decision involved the making of a material error on a point of law. The original decision is remade and allowed.

Signed 2017 **Dated** 13 June

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT:

FEE AWARD

The appeal succeeded and the tribunal makes a full fee award

Signed **Dated** 13 June 2017

Deputy Upper Tribunal Judge Manuell