



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02487/2015**

Appeal Numbers:

HU/02491/2015

THE IMMIGRATION ACTS

Heard at Newport

Decision & Reasons

On 4 October 2017

Promulgated

On 17 October 2017

Before

**UPPER TRIBUNAL JUDGE GRUBB
UPPER TRIBUNAL JUDGE H STOREY**

Between

**SUSMA SUBBA LIMBU
RONAL SUBBA**

Appellants

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellants: Mr C Howells, instructed by NC Brothers & Co, Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Nepal who were born respectively on 9 December 1989 and 7 April 1991. They are sister and brother and both are the children of the sponsor, their father, Mr Naindra Kumar. He is a former Gurkha soldier who (together with his wife) came to the United Kingdom in September 2013.
2. On 3 June 2015, the appellants made applications for entry clearance to join their father and mother in the UK as the dependent children of a

former Gurkha soldier. Their applications were, in essence, made under Art 8 of the ECHR and the relevant guidance of the Home Office in IDI, Chapter 15.

3. On 2 July 2015, the Entry Clearance Officer refused each of the appellants' applications. Those decisions were subsequently upheld by the Entry Clearance Manager on 26 October 2015.

The Appeals to the First-tier Tribunal

4. Both appellants appealed to the First-tier Tribunal. In a decision promulgated on 8 February 2017, Judge J Pacey dismissed each of their appeals. The judge accepted that there was family life between the appellants and their parents in the UK based upon emotional and financial dependence. Nevertheless, the judge found that the refusal of entry clearance was proportionate under Art 8.2 of the ECHR.

The Appeal to the Upper Tribunal

5. The appellants appealed to the Upper Tribunal on the basis that the judge had been wrong to find that the "historic injustice" recognised as engaged in cases where ex-Gurkha soldiers had been prevented from settling in the UK did not apply to children of such servicemen where they had not been born at the time their parents would have been allowed to settle in the UK but for the historic injustice. The grounds rely upon the respondent's own policy, namely IDI, Chapter 15, Section 2A Annex K at para 17 states that:

"In order to qualify for settlement under this policy the Home Office needs to be satisfied that the former Gurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then (*but otherwise the child would have been born here*) if a sponsor states that he intended to settle in the UK on discharge, then, in the absence of any countervailing evidence, this requirement would normally be considered to have been met." (emphasis added)

6. The grounds argue that, therefore, the Home Office's policy applied to the appellants as the judge had found that, had their father been allowed to settle (but for the historic injustice), the appellants would have been born in the UK. Consequently, in effect, the historic injustice was not only suffered by their father but also by them.
7. On 8 September 2017, the respondent filed a rule 24 notice. In that notice, the respondent accepted that the judge had materially erred in law in concluding that para 17 of Annex K of the respondent's policy not apply to them and that therefore they had suffered no "historic injustice".
8. At the hearing, Mr Richards acknowledged that was the Secretary of State's position. He accepted that the judge's decision could not stand. In respect of remaking the decision, Mr Richards made no submissions inviting us to dismiss the appeal. He accepted that the facts fell, in effect, within the respondent policy and that the appellants had both suffered the "historic injustice" recognised in the case law and that there were no

countervailing factors such as a poor immigration history or offending which militated against a finding that the appellant's exclusion from the UK was not proportionate.

9. Mr Howells, on behalf of the appellants took us to a number of passages in Judge Pacey's decision. He pointed out that the ECM had conceded that Art 8.1 was engaged. He relied upon the judge's findings at paras 25 and 28 of her decision that family life was established between the appellants and their parents in the UK based upon their emotional and financial dependency. Further, he relied upon the respondent's policy, which we have set out above, and that the judge had found that if the appellant's father had been allowed to settle in the UK, they would have been born in the UK and so likewise have suffered an "historic injustice".
10. Mr Howells placed considerable weight upon the Court of Appeal's decision in Gurung and Others v SSHD [2013] EWCA Civ 8 and the Upper Tribunal's subsequent decision in Ghising and Others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC). In respect of Gurung he relied upon the court's statement at [42] that:

"...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 Art 8(1) right vindicated, notwithstanding the potency of a countervailing public interest in the maintaining of a firm immigration policy."

11. In relation to Ghising he relied, in particular, upon what was said by the Upper Tribunal at [59] that:

"...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 [in maintaining a firm immigration policy]"

12. Mr Howells further relied upon what the Upper Tribunal said at [60] that:

"If the Respondent can point to matters over and above the 'public interest in maintaining of a firm immigration policy', which argue in favour of removal or refusal of leave to enter, these 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. ... But, if the Respondent is relying only upon the public interest described by the Court of Appeal at para 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour."

Discussion

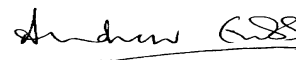
13. It is accepted that the judge's decision contained a material error of law in that she failed to take into account that a "historic injustice" had been suffered by the appellants in accordance with the Secretary of State's policy because, had the appellant's father been allowed to settle in the UK, they would have been born in the UK.

14. We agree with the Secretary of State's concession on this issue. That was an error and one which was material to the decision which accordingly we set aside.
15. As we have indicated, Mr Richards on behalf of the respondent made no positive submissions inviting us to dismiss the appeal under Art.8.
16. This is a case in which the "historic injustice" suffered by the appellants falls to be given "significant weight". The only public interest relied upon by the respondent consists in the "public interest in maintaining of a firm immigration policy" which is, of course, set out in s.117B(1) of the Nationality, Immigration and Asylum Act 2002.
17. Mr Richards did not seek to rely, in his submissions, upon any other aspect of the public interest. Although, we do note that the public interest recognised in s.117B(3) of the 2002 Act is engaged. It is plain from the evidence, that neither appellant is "financially independent". Indeed, it was part of the judge's reasoning, leading to a finding that "family life" existed between the appellants and their parents, that they were financially dependent upon their father. We were not taken to any evidence by either representative in relation to the appellants' ability to speak English and, therefore, whether the public interest recognised in s.117B(2) of the 2002 Act is engaged. We do, however, note that the first appellant is seeking to qualify as a doctor and the second appellant is a student. There is no suggestion that their studies have not been conducted through the medium of the English language.
18. In our judgment, the substance of the public interest relied upon in this case is that identified in Gurung at [41] and stated by the Upper Tribunal in Ghising at [60] as normally to be considered as outweighed by the "historic injustice" suffered by individuals such as the appellants in this case. As Mr Richards acknowledged, and Mr Howells submitted, this is not a case where there can be said to be a "bad immigration history" or any "criminal behaviour" providing greater weight or more powerful factors to weigh against the appellants' family life and the injustice that they have not been able to maintain that family life in the UK with their parents.
19. In our judgment, the interference with the appellants' family life is serious and, but for the historic injustice, they would have been born in the UK where their parents would have been settled. We weigh in the balance, against this interference, the public interest we have identified. In our judgment, it has not been demonstrated that the public interest outweighs any interference with the family life of the appellants having regard to the historic injustice suffered by them.
20. For these reasons, the appellants have established that the refusal of entry clearance to join their parents in the UK breaches Art 8 of the ECHR.

Decision

21. The decision of the First-tier Tribunal to dismiss each of the appellants' appeals involved the making of an error of law. The First-tier Tribunal's decision is set aside.
22. We remake the decision allowing each of the appellants' appeals under Art 8 of the ECHR.

Signed



A Grubb
Judge of the Upper Tribunal
16 October 2017

TO THE RESPONDENT
FEE AWARD

We have allowed each of the appeals and, in our judgment, it is appropriate to make a fee award in respect of any fee paid or payable by the appellants.

Signed



A Grubb
Judge of the Upper Tribunal

16 October 2017