



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

Appeal Number: HU/13573/2015

THE IMMIGRATION ACTS

**Heard at the Royal Courts of Decision & Reasons Promulgated
Justice
On 3 June 2019** **On 11 June 2019**

Before

**Upper Tribunal Judge Rimington
Upper Tribunal Judge Blundell**

Between

**DILIP RAI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER (NEW DELHI)

Respondent

Representation:

For the Appellant: Mr Khalid of Goulds Green Chambers, Uxbridge
For the Respondent: Mr Lindsay, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Nepalese national who was born on 17 May 1987. As long ago as 10 November 2015, he was refused entry clearance as the adult dependent child of a former Gurkha soldier. He appealed against that decision to the First-tier Tribunal and his appeal was dismissed by Judge Harris. The judge concluded that the appellant and his parents in the United Kingdom continued to enjoy a family life despite their separation since 2011 but that the respondent's decision represented a lawful and proportionate interference with that family life.

2. Permission to appeal was refused by First-tier Tribunal Judge Andrew and by Upper Tribunal Judge Kebede. An application under CPR 54.7A (a 'Cart' judicial review) was refused by HHJ McKenna but was granted by Hamblen LJ on renewal to the Court of Appeal. On 30 April 2019, therefore, permission to appeal was granted by Mr Ockelton VP, who reminded the parties that the Upper Tribunal's task was that set out in s12 of the Tribunals, Courts and Enforcement Act 2007.

The Submissions of the Parties

3. At the outset of the hearing before us, we expressed some concern that Judge Harris had cited Ghising [2012] UKUT 160 (IAC) and had concluded in reliance on that authority, at [49], that the respondent had provided a scheme for remedying the historic injustice identified in the earlier authorities. As has been asserted in the grounds presented at all stages in this case, Judge Harris erred in relying on that decision of Lang J and UTJ Jordan in so concluding because that aspect of the Upper Tribunal's decision had been over-ruled by the Court of Appeal in Gurung [2013] EWCA Civ 8; [2013] 1 WLR 2546 and the Upper Tribunal had returned to consider the weight to be accorded to the historic injustice in Ghising [2013] UKUT 567 (IAC) ("Ghising No 2"). In Ghising No 2, the Tribunal held that the historic wrong suffered by ex-Gurkha servicemen was to be given substantial weight and that:

"where it is found that Article 8 is engaged and, but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy."

4. We observed at the hearing that Judge Harris had erred in law in failing to apply the 'but for' test set out above and that his conclusion, at [52], that the historic injustice was not in itself sufficient to tip the balance in this appellant's favour was wrong in law.
5. Mr Lindsay submitted that any such error on the part of Judge Harris was not material because the matters relied upon by the respondent did not consist solely of the public interest in maintaining effective immigration control. In particular, the respondent had relied upon the statutory public interest factors in s117B of the Nationality, Immigration and Asylum Act 2002. Part 5A NIAA 2002 had not been in force when Gurung or Ghising No 2 had been decided and the judge had been entitled to attach weight to those factors and to conclude that the public interest in the appellant's exclusion outweighed his family life with his mother and father.
6. We asked Mr Lindsay whether that submission was available to him in light of [55]-[57] of Jitendra Rai [2017] EWCA Civ 320, in which the Court of Appeal accepted that the provisions of Part 5A could not affect the

outcome of the appeal when the Tribunal's assessment of Article 8(1) was defective. Mr Lindsay initially submitted that what had been said in those passages was *obiter* but he then accepted that he was in some difficulty in seeking to advance a contrary submission.

7. Mr Khalid submitted that the judge's error was not simply failing to cite Gurung or Ghising No 2. He should have applied the 'but for' test in Ghising No 2 and his failure to do so represented a fundamental error of approach. Had the judge adopted the correct approach, he would have been bound to find in the appellant's favour. There was no suggestion of bad character and it was not possible to suggest that s117B sufficed to overcome the historic injustice, particularly in circumstances where the appellant might now be financially independent or able to speak English if there had been no historic injustice. Mr Khalid invited us to set aside Judge Harris's decision and to remake the decision, allowing the appeal.
8. Mr Lindsay accepted that this was a case in which the decision fell to be remade by the Upper Tribunal in the event that the decision of the FtT was set aside. He had no further submissions to make as to the disposal of the appeal.
9. Mr Khalid invited us to order that the appellant should recover the costs of the proceedings in the event that the appeal was to be allowed.
10. We indicated that we would set aside Judge Harris's decision and remake the decision on the appeal. We reserved that decision for postal delivery.

Discussion

11. We are satisfied that Judge Harris erred in law. Before explaining why we reach that conclusion, we should summarise his reasoning more fully than we have above.
12. At [27], the judge concluded that the appellant and the sponsor continued to enjoy a protected family life. From [31], he turned to consider the issue of proportionality. He found that s117B(1), (2) and (3) NIAA 2002 militated against the appellant because the maintenance of immigration control is in the public interest and he was neither financially independent nor able to speak English: [33]-[36]. He noted that the historic injustice suffered by the Gurkhas was a significant factor but he concluded that the respondent had issued a policy (Annex K) which was designed to address that injustice. The appellant was unable to meet all the criteria in that policy because he had been living apart from the sponsor for more than two years: [38]-[47]. Judge Harris was satisfied that the guidance in Ghising [2012] UKUT 160 (IAC) applied to the current scheme in the Annex K policy and that he should take this into account in his assessment of proportionality: [49]. At [53]-[54], he concluded that there were no compelling circumstances which warranted a conclusion that the appellant's continued exclusion was disproportionate. The reasons that he reached that conclusion were summarised at [52]:

'Given the redressing of the historic injustice by the creation of the policy, I am not satisfied that the mere existence of the historic injustice affecting the appellant is by itself sufficient to make the refusal of entry clearance disproportionate. Moreover, having carefully read the Court of Appeal's judgment, I am not persuaded by the submission of Mr Khalid that Jitendra Rai is authority for saying that, in cases involving the adult children of Gurkha veterans, compelling or exceptional circumstances are not required to establish a disproportionate interference with the right to respect [sic] and that the existence of the historic injustice is enough'.

13. In summary, therefore, Judge Harris concluded that the introduction of an amended policy (in 2015) had addressed the historic injustice suffered by the Brigade and their family members and that the public interest factors in s117B NIAA 2002 outweighed the appellant's family life. In our judgment, neither limb of that reasoning withstands scrutiny.
14. The respondent's current policy is entitled *Gurkhas discharged before 1 July 1997 and their family members*. It is in its second iteration, which was issued on 22 October 2018. It is clear from page 11 of the policy, however, that the part of it which is material for present purposes replicates guidance which was issued on 5 January 2015. It was that policy which was known as Annex K. From 2015 onwards, therefore, the respondent's policy guidance has contained the following list of factors for Entry Clearance Officers to consider in such cases (we have numbered the bullet points for ease of reference):
 - (1) the former Gurkha parent has been, or is in the process of being granted settlement under the 2009 discretionary arrangements or was granted leave under the 2004 Immigration Rules where the requirement to have been discharged on or after 1 July 1997 had been waived
 - (2) the applicant is the son or daughter of the former Gurkha
 - (3) the applicant is outside the UK
 - (4) the applicant is between 18 and 30 years of age (including applicants who are 30 on the date of application)
 - (5) the applicant was under 18 years of age at the time of the former Gurkha's discharge
 - (6) the applicant is financially and emotionally dependent on the former Gurkha
 - (7) the Secretary of State is satisfied that an application for settlement by the former Gurkha would have been made before 2009 had the option to do so been available
 - (8) the applicant has not been living apart from the former Gurkha for more than 2 years on the date of application, and has never lived apart from the sponsor for more than 2 years at a time, unless this was by reason of education or

something similar (such that the family unit was maintained, albeit the applicant lived away)

(9) the applicant has not formed an independent family unit

(10) the applicant does not fall to be refused on grounds of suitability under paragraph 8 or 9 of Appendix Armed Forces or those provisions of part 9 of the Immigration Rules (general grounds for refusal) that apply in respect of applications made under Appendix Armed Forces of the Immigration Rules.

15. In our view, this list of factors was prepared to assist junior officials to make Article 8 ECHR compliant assessments in the majority of cases by signposting factors which are relevant to the various stages of the assessment. Factor (1) relates to the status of the sponsor. Factors (2), (4), (6), (8) and (9) relate to the engagement of Article 8 in its family life aspect. Factors (5), (7) and (10) relate to proportionality. In many cases, consideration of those factors would produce a sensible, structured consideration of the issues which emerge from years of litigation, without the need for an ECO to analyse decisions from Kugathas [2003] INLR 1 to Rai [2017] EWCA Civ 320.

16. It is not suggested in the policy that consideration of these factors would produce an Article 8 ECHR compliant assessment in all cases. Nor is it suggested, as Judge Harris thought, that the intention was to redress the historic injustice by the promulgation of this list of factors. On the contrary, the policy is clear that Article 8 ECHR falls for consideration in all cases which do not satisfy the list of factors. The relevant section of the guidance provides as follows:

‘As part of any proportionality aspect of the Article 8 consideration, you must have taken account of the relevant case law below:

The Court of Appeal confirmed in Gurung and Ors, R (on the application of) v Secretary of State for the Home Department [2013] ECWA Civ 8 (21 January 2013) that the “normal position is that they [adult dependent relatives] are expected to apply for leave to enter or remain under the relevant provisions of the Rules or under the provisions of Article 8 of the European Convention on Human Rights”.

The Court also found that the historic injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be taken into account during the Article 8 consideration of the case but was not determinative: “If a Gurkha can 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 child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now” [42].

The Upper Tier Tribunal found in Ghising and others [2013] UKUT 00567 (IAC) that where Article 8 is engaged and, but for the historic

wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the Appellant's favour, where the matters relied upon by the Secretary of State/entry clearance officer (ECO) consist solely of the public interest in maintaining a firm immigration policy.

If, in the course of the consideration, matters come to light that may be prejudicial to maintaining a fair immigration policy, the Secretary of State (and those acting on their behalf) may consider whether public interests are best served by refusal of leave to enter or remain. In some cases, this may ultimately mean removal from the UK. Thus, a poor immigration history and/or criminal behaviour may be sufficient to outweigh other factors that have been brought forward on the appellant's behalf.

In all cases where either an application under this policy or an application under Article 8 is refused, the applicant should be given a written refusal of their application. This should set out why their application falls for refusal under the relevant areas considered / applicable.'

17. The effect of the 2015 policy was not to abrogate the previous authorities, therefore, but to underline the continuing application of the 'but for' test which emerged from Gurung and Ghising No 2. Having concluded that there was a family life in existence between the appellant and the sponsor, Judge Harris erred in law in failing to follow that approach when assessing the proportionality of the appellant's continued exclusion from the United Kingdom.
18. Judge Harris also concluded that section 117B NIAA 2002 militated against the appellant in the assessment of proportionality. We do not consider that the public interest factors in Part 5A of the Act are capable, however, of overcoming the historic injustice in a case such as the present, by which we mean a case in which there is no poor immigration history or criminal behaviour. We reach that conclusion for the following reasons.
19. Firstly, that conclusion is supported by Jitendra Rai, in which the Court of Appeal accepted the submission made on behalf of the appellant that 'in view of the historic injustice underlying the appellant's case, such considerations would have made no difference to the outcome and certainly no difference adverse to him': [55]-[57]. Mr Lindsay submitted that what was said by Lindblom LJ in those paragraphs was *obiter dicta* but we do not think that is correct because the appeal would not have been allowed and remitted to the Upper Tribunal if s117B was capable of outweighing the historic injustice in a case such as this.
20. Secondly, even if we are wrong in our understanding of Jitendra Rai, we do not consider that s117B is capable, as a matter of law, of outweighing the historic injustice recognised in the authorities in a case such as the present. Part 5A was inserted into the 2002 Act by s19 of the Immigration

Act 2014 on 28 July 2014. By that stage, the Court of Appeal and the Upper Tribunal had reached a concluded view on the weight which was to be attached to the historic injustice in cases such as this. Parliament must be taken to have legislated in light of that consistent line of authority: Robinson [2019] UKSC 11; [2019] 2 WLR 897, at [62]. In so doing, Parliament made no attempt to over-rule that consistent line of authority. It required courts and Tribunals to have regard to the consideration that the maintenance of effective immigration control is in the public interest in full knowledge of the established jurisprudence which established that the weight to be given to immigration control can be reduced in certain circumstances. Situations in which there has been administrative delay was one such situation: EB (Kosovo) [2008] UKHL 41; [2009] 1 AC 1159 refers. Situations in which there had been a recognised historic wrong was another. Whilst the Tribunal is required to have regard to the general public interest in maintaining effective immigration control, therefore, it also has regard to the authorities which bear on the weight which can properly be attached to the public interest in the specific circumstances under consideration. Judge Harris erred in failing to recognise the continuing application of those principles when he came to consider s117B(1).

21. We consider that Judge Harris also fell into error in his consideration of s117(2) (English language) and s117B(3) (financial independence). In a case of this nature, we do not consider that those factors can properly be held against an appellant when the historic injustice is borne in mind. The historic injustice against the Brigade meant that retired Gurkhas were not able to live in the United Kingdom. When that injustice was remedied, a further one came about, in that they were not able to bring their dependents to the United Kingdom. Had the historic injustice not occurred, therefore, those in the appellant's category would have come to the United Kingdom and would have had an opportunity to learn English and to become financially independent. To apply s117B(2) and (3) to the detriment of an appellant such as this is therefore to allow the respondent to gain an advantage from the historic injustice. Whilst it is mandatory to have regard to those general considerations in any proportionality assessment, therefore, we do not consider that it was appropriate for Judge Harris to attach weight to them on the facts of this case.
22. Thirdly, we note that the October 2018 guidance contains instructions to Presenting Officers in cases of this nature. That guidance does not suggest that s117B NIAA 2002 has the effect which Judge Harris thought it did in this case. Whilst the respondent's guidance is obviously not an aid to statutory construction, we note that the absence of reference to Part 5A in that guidance is consistent with our conclusion that those general factors are not capable – absent countervailing considerations such as an adverse immigration history or criminality – from outweighing the significant weight which is to be attached to the public interest in a case such as the present.

23. In the circumstances, we have come to the clear conclusion that the First-tier Tribunal's assessment of proportionality in this case was vitiated by legal error. The fact that the appellant had lived apart from the sponsor for more than two years meant that he was not able to satisfy the terms of the policy, as Judge Harris found. But he was found to have continued to enjoy a family life with his parents since they had departed Nepal and come to the United Kingdom and it has been accepted throughout that the appellant's father would have brought his family to the UK before 2009 had they been permitted to do so. In the absence of any countervailing considerations, and we find there are none, the outcome required by Gurung and Ghising No 2 is clear and neither the amendment of the policy nor the introduction of Part 5A NIAA 2002 justifies a different outcome. We therefore set aside Judge Harris's proportionality assessment and remake the decision on the appeal in light of his findings of fact. For the reasons we have set out above, we conclude that the respondent's decision represented a disproportionate interference with the appellant's family life and the appeal is allowed on Article 8 ECHR grounds.
24. Mr Khalid invited us to order that the appellant, or rather the sponsor, should recover the costs of these proceedings. We were asked to consider a short statement from the sponsor in which he stated that the proceedings had been protracted and he had found it difficult to meet the expense, given that he is a pensioner. Whilst we sympathise with the sponsor in this regard, we do not consider that we are able to make any such order.
25. The Upper Tribunal's costs jurisdiction is governed by section 29 of the Tribunals, Courts and Enforcement Act 2007. The wide powers conferred by s29(1)-(2) have effect subject to Tribunal Procedure Rules, however. Rule 10 of Tribunal Procedure (Upper Tribunal) Rules 2008 is the relevant provision for present purposes. Rule 10(3) permits the Upper Tribunal to make an order for costs in very specific circumstances, as Mr Khalid was eventually constrained to accept. He had initially submitted that these were judicial review proceedings but that is plainly wrong. Whilst the proceedings before HHJ McKenna and Hamblen LJ might be described in that way, the effect of Hamblen LJ's order was to quash UTJ Kebede's refusal of permission to appeal. Permission to appeal was then granted by the Vice President, who made reference to s12 of the TCEA 2007 at that time. It could not be clearer that the proceedings before us are statutory appeal proceedings under that part of the Act, rather than judicial review proceedings under ss15-21 of the Act.
26. Rule 10(3) also gives this chamber of the Upper Tribunal power to order wasted costs or where a party or his representative had acted unreasonably in the proceedings. Mr Khalid did not seek to suggest that an order should be made on either basis. He was correct not to make that submission.

27. Ultimately, it transpired that the sponsor was particularly keen to recover the costs of the proceedings under 54.7A of the Civil Procedure Rules; the Cart judicial review proceedings. Mr Khalid was not able to direct our attention to any provision in the TCEA, the UT Rules or the CPR under which we could make such an order. As he accepted, he would have to make a late application to the Administrative Court or the Court of Appeal for such an order. We do not consider it appropriate to express a view on any such application, whether in terms of its timeliness or its merits.

Notice of Decision

The decision of the First-tier Tribunal was materially erroneous in law and is set aside. We remake the decision on the appeal, allowing it on Article 8 ECHR grounds.

No anonymity direction is made.

Signed

Date 11 June 2019

MARK BLUNDELL
Judge of the Upper Tribunal