



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

OA/14166/2013

Appeal Numbers:

OA/14168/2013

THE IMMIGRATION ACTS

Heard at Field House
On 21st August 2014
Prepared 27th August 2014

Determination Promulgated
On 15th September 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

MANISHA GURUNG

First Appellant

And

INDRA GURUNG

Second Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity directions not made.

For the Appellant: Mr R Jesurum (Counsel, instructed by Makka Solicitors Ltd)

For the Respondent: Mr L Tarlow (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants applied to enter the UK for settlement as dependent relatives of their father over the age of 18. The applications were refused for the reasons given in the Refusal Notices of the 18th of June 2013. Their appeals were heard together by First-tier Tribunal Judge Froom at Hatton Cross on the 30th of May 2014. In a determination promulgated on the 6th of June 2014 Judge Froom allowed the appeals. The Secretary of State sought permission to appeal to the Upper Tribunal in grounds of the 16th of June 2014 with permission being granted by the First-tier Tribunal on the 26th of June 2014.
2. The Appellants are both adults and nationals of Nepal. Their father served in the British army and left the army in May 1997 before the Appellants were born. He came to the UK in 2011 to settle being joined by the Appellants' mother shortly afterwards. The Judge found that there was

family life between the Appellants and their parents and there was both financial and emotional dependency and that there was an existing family unit. He also found that the Sponsor would have settled in the UK on his discharge from the army if that had been possible in 1997. The Judge went on to find, relying on both of the Ghishing cases 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 that would normally determine the proportionality assessment in the Appellant's favour. Accordingly he allowed the appeal.

3. The Secretary of State sought permission to appeal on the basis of the grounds of the 16th of June 2014. In the grounds it was submitted that there was no evidence that the Appellants had suffered the historic injustice and that the Judge had failed to provide adequate reasons when considering proportionality. Permission was granted on the 26th of June 2014.
4. The situation of the children of former Ghurka soldiers now living in the UK is slightly different from others as there is the issue of the historic injustice that prevented Ghurka soldiers from Nepal from settling in the UK following their discharge from the army. The main cases that consider the position of adult children abroad who may have benefitted from the new policy had it applied earlier are Ghishing (family life – adults – Ghurka policy) [2012] UKUT 00160 (IAC) and Ghishing and others (Ghurkas/BOCs: historic wrong: weight) [2013] UKUT 00567 (IAC).
5. From Ghishing [2013] it is now the case that where it is found that article 8 is engaged and but for the historic wrong the family would have settled in the UK that will ordinarily determine the outcome of the proportionality exercise in the Appellant's favour if the sole point raised by the Secretary of State is the public interest in maintaining immigration policy. A bad immigration history and/or criminal behaviour could still outweigh the factors on the Appellant's side of the equation.
6. I propose to deal with the matters raised briefly. The grounds amount to a disagreement with the findings made. It has not been shown that the findings that the Judge made, in particular those at paragraph 28, were not open to him on the evidence that he had to consider. Against the findings made the Judge was obliged to apply the guidance in the Ghishing cases and the Secretary of State cannot point to any negative factors on the Appellants' part that would negate the positive findings made on their behalf. In short the determination, read properly and as a whole, contains no errors of law. The findings made were open to the Judge and for the reasons that he gave.
7. At the hearing the Appellants' representative sought a costs order against the Secretary of State on the basis that the Secretary of State acted unreasonably in bringing the proceedings relying on The Tribunal Procedure (Upper Tribunal) Rules 2008, rule 10(3)(d). I am not satisfied that this ground is made out. While I had little difficulty in dismissing the Secretary of State's appeal the Secretary of State was granted permission to appeal to the Upper Tribunal and was entitled to take encouragement from that. In the circumstances I cannot be satisfied that it could properly be said that the Secretary of State had acted unreasonably.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

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

Fee Award

I make a fee award in the full sum of the fees paid by the Appellants.

Reasons: The Appellants' appeals have been allowed.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 11th September 2014