



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

Appeal Number: IA/03774/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 5 March 2015**

to parties

**Promulgated and sent
On 11 March 2015**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ROSHAN THAPA

(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, instructed by Howe & Co, solicitors

For the Respondent: Ms C Johnstone, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The applicant is a citizen of Nepal. He appeals with permission against the decision of the First-tier Tribunal Judge Broe dismissing his appeal against the Secretary of State's decision to refuse him leave to remain in the United Kingdom as the dependent relative of his father, a former Ghurkha now settled in the United Kingdom.

First-tier Tribunal determination

2. The factual matrix in this appeal is not contentious. It is set out in paragraphs [23]-[25] of the First-tier Tribunal decision as follows:

“23. There is little dispute as to the factual background to this appeal. The appellant is a 28 year old man and a citizen of Nepal. His father is a Ghurkha veteran who served from 1972 to 1990 when at the time of his discharge there was no settlement policy for Ghurkhas. His father came to this country in 2006 and was granted indefinite leave to remain. He then returned to Nepal following the death of the appellant’s youngest sister. His father then came back to this country, followed by his mother in 2009. She is now settled in this country as are two of the appellant’s sisters. His other sister, the oldest, is married and has two children. She spends her time in India and Nepal.

24. The appellant stayed in Nepal after his parents came to this country. He completed a university course in 2008 but did not work thereafter. He was supported by his father and lived in the family home which they still have. He has a bank account in Nepal. He came to this country as a student in December 2010 and has lived with his parents and sisters since then. He has gained a postgraduate qualification and he also worked part time for about six months.

25. I accept that his father has financed his studies and provides some financial support in the form of ‘pocket money’. I also accept that, had he been able to do so, it is probable that his father and the rest of the family would have come to this country after his discharge in 1990. I have no doubt that the loss of the appellant’s sister was traumatic for the whole family.”

3. The judge dismissed the appeal, relying on *Ghising (Family life - and adults - Ghurkha policy)* [2012] UKUT 00160 (IAC) (*Ghising No.1*).

Upper Tribunal appeal

4. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Perkins on 22 July 2013, in the light of the decision of the Court of Appeal in *Gurung v Secretary of State for the Home Department* [2013] EWCA Civ 8. At an error of law hearing on 26 September 2013, Deputy Upper Tribunal Judge Wilson found no error of law and dismissed the appeal. The Upper Tribunal determination was promulgated on 10 October 2013.

Court of Appeal proceedings

5. The appellant appealed to the Court of Appeal. The proceedings in the Court of Appeal were stayed pending the outcome of *SG (Nepal) C5/2013/2336*, which concerned the proper threshold for family life between adults. In due course, *SG*’s case and other linked cases allowed by consent and remitted to the Tribunal for remaking.

6. On 12 February 2014, the proceedings in this appellant's case were settled by a consent order and statement of reasons, the terms of which are important in determining what is to be done with the appeal now.
7. In the Statement of Reasons, the Court of Appeal indicated that the appeal had been adjourned pending the outcome of; that the respondent agreed that the determinations of the First-tier Tribunal and Upper Tribunal contained material errors of law; that the First-tier Tribunal judge had misdirected himself as to the test for family life between adult family members; and crucially, that the respondent agreed that on the facts of this appeal, Article 8(1) was engaged.
8. The Consent Order which the parties agreed was as follows:
 - "1. The application for permission to appeal and the appeal be allowed to the extent that:
 - (i) the determination of the Upper Tribunal (Immigration and Asylum Chamber) of the 10th October 2013 be set aside;
 - (ii) the determination of the First-tier Tribunal of the 24th May 2013 be set aside in its conclusion as to Article 8;
 2. The appeal be remitted to the Upper Tribunal to be reheard (on the basis that it is accepted that the respondent's decision is one which engages Article 8(1) applying the principles applicable to Article 8(2) set out in *Gurung [2013] 1 WLR 2456* and *Ghising [No.2]*).
 3. The respondent pay the appellant's reasonable costs, to be assessed if not agreed."
9. The appeal was remitted to the Upper Tribunal 'for a rehearing on the issue of Article 8(2) and for the determination to be remade' applying *Gurung* and *Ghising No.2*. The respondent agreed to pay the appellant's reasonable costs of the statutory appeal, to be assessed if not agreed. That was the basis on which the error of law hearing came before me.

Error of law hearing

10. At the beginning of the error of law hearing, having regard to the respondent's latest policy on adult family members of former servicemen, issued in January 2015, Ms Johnstone for the respondent withdrew the underlying decision. Ms Johnstone indicated that it was now the respondent's policy that all adult dependant Ghurkha decisions should be withdrawn and reassessed in the light of that new policy, a copy of which she had brought to the hearing.
11. She confirmed that withdrawal in writing, indicating that the respondent had withdrawn the immigration decision of 16 January 2013 and that, in accordance with rule 17(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, which came into force on 20 October 2014, 'the appeal is treated as withdrawn'. As far as the appeal in the First-tier Tribunal is concerned, that is correct.

12. However, pursuant to rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (Upper Tribunal Rules) as amended, the consent of the Upper Tribunal is required if a party wishes to withdraw their case before the Upper Tribunal. Ms Johnstone applied to me for leave to withdraw the First-tier Tribunal decision. In the alternative, there being now no underlying decision, she asked that the Upper Tribunal appeal be dismissed.
13. For the appellant, Mr Jesurum opposed the withdrawal by the respondent, of which he had no notice until the hearing had begun. He argued that in the light of the consent order in the Court of Appeal, and having regard to *AG (Kosovo)* at paragraph [30] the Article 8 issue should be determined before any policy matters were considered. In addition, applying *SM (withdrawal of appeal decision: effect) Pakistan* [2014] UKUT 64 (IAC), the Tribunal must dispose of the appeal even where a party's case had been withdrawn. He argued that the appropriate disposal was to allow the appeal, applying the decision of the Upper Tribunal in *Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) (Nepal)* [2013] UKUT 567 (IAC) ('*Ghising No.2*').
14. Addressing himself to the matters set out in sub-paragraph (4) of the *SM (Pakistan)* guidance, Mr Jesurum argued, in effect, that the withdrawal of the respondent's case before the Upper Tribunal must be taken to be a withdrawal of her opposition to the appellant's appeal. There was no question here of country guidance being required. The timing of the withdrawal was not to the respondent's credit, having been made at the hearing with no notice whatever to the appellant (not even between Counsel, before the hearing began). He relied on the Court of Appeal consent order and the guidance in *Ghising No.2*, which had led to the change in the respondent's policy in January 2015. He contended that it was inappropriate to allow the respondent to re-make the decision unless she could show that, applying *Ghising No.2*, there might be a proper reason to continue to refuse to allow the appellant to settle, on suitability grounds capable of redressing the historic injustice.

Discussion

15. In relation to the position of adult dependants of Ghurkha servicemen affected by the historic injustice, I am guided by the judicial headnote to the Upper Tribunal's decision in *Ghising No.2*, as follows:

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

(2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the

burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).

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

(4) Accordingly, 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.

(5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. If the Respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which argue in favour of removal or the refusal of leave to enter, these matters 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 of the balance."

Ms Johnstone for the respondent confirmed that no factors of the type mentioned in (5) of the guidance were recorded in the documents on her file, and that she was unaware of any such factors in the appellant's case. He did not have a bad immigration history or a record of criminal behaviour. I remind myself that the respondent conceded, and the Court of Appeal found, that Article 8(1) is engaged by this case, and that the First-tier Tribunal found, and the respondent has not contested, that the appellant's father and the whole family would have come to the United Kingdom at the end of the father's service in 1990, but for the historic injustice.

16. The respondent has withdrawn her decision and seeks to withdraw her case before the Upper Tribunal. Not much assistance can be gained from her Rule 24 Reply as to what that case might be now, but it is clear from the consent order of the Court of Appeal that it is now accepted on behalf of the respondent that Article 8(1) is engaged. The guidance in *SM (Pakistan)* confirms that while the Upper Tribunal cannot withhold consent to the withdrawal of the underlying decision against which the appellant appealed to the First-tier Tribunal, the Upper Tribunal continues to have jurisdiction in relation to the appeal before it, since

“(2) ... Such a withdrawal is not, without more, one of the ways in which an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ceases to be pending.”

17. The Upper Tribunal then gave guidance as to what must be done in such circumstances:

“(3) When remaking a decision in a 2002 Act appeal where the decision against which a person appealed has been withdrawn by the Secretary of State, the Upper Tribunal will need to decide whether:-

- (i) to proceed formally to dismiss (or, in certain circumstances, allow) the appeal; or*
- (ii) to determine the appeal substantively, including (where appropriate) making a direction under section 87 of the 2002 Act.*

(4) In deciding between (i) and (ii) above, the Upper Tribunal will apply the overriding objective in rule 2 of the 2008 Rules, having regard to all relevant matters, including:-

- (a) the principle that the Secretary of State should, ordinarily, be the primary decision-maker in the immigration field;*
- (b) whether the matters potentially in issue are such as to require the Tribunal to give general legal or procedural guidance, including country guidance;*
- (c) the reasons underlying the Secretary of State’s withdrawal of the appealed decision;*
- (d) the appeal history, including the timing of the withdrawal;*
and
- (e) the views of the parties.”*

18. Dealing first with point (4), I accept of course that the respondent should, ordinarily, be the primary decision maker in the immigration field. However, I recall also that as recently as the respondent’s acceptance on 12 February 2014 by way of a consent order that the appropriate course is for the decision to be remade in the Upper Tribunal on the basis that Article 8(1) is engaged.
19. I have taken into account the views expressed by both parties as to what should be done. I refuse to consent to the withdrawal of the respondent’s case before the Upper Tribunal since, in my judgment, it is in the interests of justice and the overriding objective that I should now determine the appeal. The facts have been found and there are no adverse factors identified relating to this particular appellant. No satisfactory explanation was advanced at the hearing as to why the *Ghising No.2*-compliant policy issued by the respondent in January 2015 should affect that assessment, nor why the respondent should have waited until the morning of the error of law hearing to withdraw her decision.
20. I apply the *Ghising No.2* guidance. This appellant is the son of a father affected by the historic injustice and, with the rest of his family, would have come to the United Kingdom in 1990 at the end of his father’s military service had it been possible for them to do so. He remains a

dependant of his father, living at home in either country and supported by his father. There is no reason why the appeal should not be allowed outright and a direction made.

21. I gave an indication at the hearing that I proposed to allow the appeal, but reserved my decision. Mr Jesurum then raised the question of costs. This being an appeal from the First-tier Tribunal, paragraph 10(1) governs the power to make a costs order. No written application under paragraph 10(5) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (Upper Tribunal Rules) had been made before the hearing. Mr Jesurum proceeded to write on a piece of paper 'I apply for costs' which he sought to hand up. I refused to accept that as an application for costs: paragraph 10(5) requires both a written application for costs and a statement of costs and expenses incurred. Mr Jesurum indicated that those instructing him may well make an application for costs after the hearing. The Upper Tribunal will expect, if such an application is made, that it should set out clearly the basis on which the appellant contends that an award of costs should be made.

Decision

The First-tier Tribunal decision did contain a material error of law. It has been set aside and I now remake the decision by allowing the appeal.

Direction

The respondent is directed to grant the appellant leave to remain in the United Kingdom in line with his father and other family members in the United Kingdom.

Signed

Date

Upper Tribunal Judge Gleeson