



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

Appeal Number: IA/39200/2013

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 8 July 2015

Promulgated

On 14 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

SANDEEP RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Duncan of Counsel instructed by NC Brothers & Co, solicitors

For the Respondent: Ms E Savage of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a subject of the Kingdom of Nepal, born on 12 December 1984. In 2011 he entered with leave as a student expiring on 2 March 2013. In time, he applied for indefinite leave to remain outside the Immigration Rules on the basis that he was a dependent of his father, a

retired Gurkha soldier. Between 2002 and coming to the United Kingdom as a student he had studied in the United States.

The Decision

2. On 6 September 2013 the Respondent refused the Appellant's application on the basis that it was for a purpose not covered by the Immigration Rules. The Appellant was at the date of decision 28 years old and the Respondent considered he would be able to support himself in Nepal, having had the benefit of education in the United States and the United Kingdom. He had lived away from his parents for over ten years before coming to the United Kingdom. The argument that Gurkhas had suffered an historic injustice by being refused settlement in the United Kingdom before 1997 had to be taken into account but was not determinative and the circumstances of the Appellant's case were not exceptional such that he should be granted settlement. The Respondent proposed to remove him to Nepal.
3. The Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules. He had failed to establish there were exceptional circumstances or sufficiently compelling or compassionate circumstances which would merit granting him leave to remain outside the Immigration Rules or by way of reference to Article 8 of the European Convention.
4. On 25 September 2013 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds referred to the judgments in *Sharmila Gurung and Others v SSHD [2012] EWHC 1629 (Admin)* and *UG, NT, RM and YP (Nepal) v ECO [2012] EWCA Civ 58*. The grounds asserted the Respondent's decision was oppressive and arbitrary.

The First-tier Tribunal's Determination

5. By a determination promulgated on 24 September 2014 Judge of the First-tier Tribunal Prior dismissed the appeal. The Appellant sought permission to appeal which on 12 November 2014 Judge of the First-tier Tribunal P J M Hollingworth refused. The application was renewed on the same grounds to the Upper Tribunal where Deputy Upper Tribunal Judge Archer granted permission to appeal on the grounds that it was arguable the Judge had disregarded the purpose of the policy and the historic injustice argument in respect of dependants of Gurkha soldiers, had failed to account of the difficulty the Appellant or his father would have in producing evidence of intention to settle in the United Kingdom on the Appellant's father retiring from the Brigade of Gurkhas and had failed to make clear findings on the evidence.

The Upper Tribunal Hearing

6. The Appellant and his father attended the hearing. In the event neither of them gave evidence. Mr Duncan for the Appellant relied on the grounds submitted in support of the application to the Upper Tribunal for permission to appeal. The Judge had failed to take into account the

historic injustice worked on the Gurkhas. Indeed at para.25 of his determination he had concluded that no weight should be attached to it. At paragraph 59 of the determination in *Ghising and Others (Gurkhas/BOCs: Historic wrong: weight) [2013] UKUT 567 (IAC)* the Upper Tribunal had accepted the submission that:

“... where Article 8 is held to be engaged and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this will ordinarily determine the outcome of the proportionality assessment; and determine it in an Appellant’s favour. The explanation for this is to be found, not in any concept of new or additional “burdens” but, rather, in the weight to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. ... 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 ... “

7. The Judge had set the bar for establishing an intention to settle in the United Kingdom at too high a level at para.22 of his determination. Further, there had been no cross-examination or submissions made on this particular issue. Absent any challenge, he submitted this amounted to a material error of law as identified at para. 2 of the Upper Tribunal’s grant of permission. There was evidence of the intention of and desire of the Appellant’s father to settle in the United Kingdom.
8. The Judge had not given due appreciation to the case law specific to the children of former members of the Brigade of Gurkhas. At this point he added the Appellant’s mother had died some two months earlier which was a change in circumstance since the appeal had been heard in the First-tier Tribunal. The Judge had in any event failed to make any fact specific findings in his assessment of the family life of the Appellant which had been re-established on his coming to the United Kingdom in 2011. At para 26 of his determination the Judge had said he was not satisfied there were sufficiently close emotional ties on the part of the Appellant to his parents to constitute family life. This did not pay regard to the Sponsor’s stated intention and hope that the family would be able to establish itself as a unit in the United Kingdom. Additionally, the Judge had not made any reference to the financial support given to the Appellant by members of his family. Further, the Judge had not taken into account the fact the Appellant had no family in Nepal.
9. The Respondent’s claim was there was no clear and unchallenged evidence that the Appellant’s father in 1989 or 1990 wished to settle in the United Kingdom. The Judge had failed to take account that there had been no mechanism for the Appellant or his father to settle in the United Kingdom until after the Appellant had become an adult.
10. Mr Duncan relied on the determination in *Ghising* and concluded that the Judge had failed to take into account that it had not been possible for the

Appellant's father to settle in the United Kingdom until the Appellant had ceased to be a child.

11. For the Respondent, Ms Savage relied on the response under Procedure Rule 24. The Judge had properly considered the evidence as well as the relevant policies and case law. The Appellant had not shown there was any existing family life and the Judge had not been satisfied that there were sufficiently close ties between the Appellant and his family in the United Kingdom to meet the test in *Kugathas v Immigration Appeal Tribunal [2003] EWCA Civ 31*. The Appellant had been at boarding school from 1998 until 2002 when he had gone to the United States where he had been living independently of his parents. When he had entered the United Kingdom in 2011 he had not evinced any intention to remain. On this basis it was open to the Judge to make his findings.
12. She referred to paragraphs 47 and 48 of the judgment in *R (Gurung and Others) v SSHD [2013] EWCA Civ 8* in which the Court of Appeal had found in respect of two appellants aged 24 and 26 at the relevant time and were living in Nepal that the First-tier Tribunal did not err in law in considering in the circumstances which it had found that there was little evidence of family life between the appellants and their father who was their Sponsor, although he supported them financially as was expected in Nepalese culture. These were findings similar to those made by the Judge at para.26 of his determination. The Judge had been entitled to make the finding about the absence of family life and nevertheless he had considered the proportionality of his decision. At para.21 he had referred to policy considerations arising out of the historic injustice and at para.22 to the lack of evidence of the Appellant's father's intention to settle in the United Kingdom. It was notable the Appellant had remained in the United States after his father had obtained leave and entered the United Kingdom in 2004 but he stayed in the United States until coming to the United Kingdom in 2011.
13. Mr Duncan reiterated the point that the appellants in *R (Gurung and Others)* were out of the country and the Appellant in this case had been in the United Kingdom since 2011. At paragraph 42 of *R (Gurung and Others)* the Court of Appeal had said:

If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (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

He referred to paragraphs 3 and 4 of the headnote in the determination in *Ghising*:

- (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, ... 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... consist solely of the public interest in maintaining a firm immigration policy.

The First-tier Tribunal's determination contained an error of law and should be set aside.

Findings and Consideration

- 14.** The Judge referred to para.59 of *Ghising* at para.21 and then concluded that there was not clear and unchallenged evidence that the Appellant's father had wished to settle in the United Kingdom. This failed to take into account the statements made by the Appellant's father about what he would have done if he had had a right of settlement in the United Kingdom and been informed of it when he had completed his military service had not been challenged at the First-tier Tribunal's hearing. His conclusion at para.25 that no weight should be attached to the historic wrong in the absence of any materially adverse matters does not reflect the learning contained in headnote 3 of the determination in *Ghising*.
- 15.** The Appellant had been in the United Kingdom living with his parents for some three years by the time of the First-tier Tribunal's hearing. The claim finding at para.26 that in effect there was no family life between the Appellant and his parents was unsupported. It is not difficult to establish family life. The issue which the Judge needed to have addressed was whether family life was of a nature that the decision to remove constituted an interference with it sufficient to engage Article 8 and the State's obligations under Article 8 and if so whether the decision to remove was proportionate to the need to maintain proper immigration control. Again the Judge did not take into account what was said about proportionality in such circumstances at para.59 of the determination in *Ghising*. These errors would have seriously affected the Judge's assessment of the claim under Article 8 of the European Convention.
- 16.** The test propounded by the Tribunal in *Gulshan [2013] UKUT 640 (IAC)* was not as stated at para.27 of the Judge's determination, namely exceptional and compassionate circumstances. The test was "exceptional circumstances" meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual or their family such that refusal of the application would not be proportionate: see para.15 of *Gulshan*.
- 17.** For these reasons I find the First-tier Tribunal's determination contains errors of law such that it is unsafe and should be set aside in its entirety.

18. I enquired whether parties were ready to proceed. Mr Duncan reminded me that the Appellant's mother had passed away some two months previously so that there were now changed circumstances and so additional statements would need to be prepared. Having set aside the decision of the First-tier Tribunal, s.12(2) of the Tribunals, Courts and Enforcement Act 2007 allows for the case to be remitted to the First-tier Tribunal with directions or for the Upper Tribunal to re-make it. Having regard to the Practice Statement 7.2 (B) and that additional evidence will need to be obtained or prepared may consider it appropriate for the matter to be remitted to the First-tier Tribunal for re-hearing afresh.

Anonymity

19. There was no request for an anonymity direction or order and I do not consider any is required.

NOTICE OF DECISION

The determination of the First-tier Tribunal contained errors of law such that it should be set aside. The matter is remitted to the First-tier Tribunal for hearing afresh.

Signed/Official Crest
2015

Date 10. vii.

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal