



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

Appeal Numbers: OA/14726/2013
OA/14730/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 27 February 2015**

**Determination
Promulgated
On 11 May 2015**

& Reasons

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**UMA SIJALI MAGAR
URMILA SIJALI MAGAR**

Appellants

and

ENTRY CLEARANCE OFFICER - NEW DELHI

Respondent

Representation:

For the Appellants: Mr M Henderson, Counsel instructed by Howe & Co Solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Nepal born on 10 June 1989 and 30 October 1991, respectively. They applied for entry clearance as the dependent children of their father, Dambar Bahadur Sijali Magar, an ex-Gurkha soldier. Their applications were refused in decisions dated 19 June 2013.

2. Their appeals against those decisions came before First-tier Tribunal Judge Aujla on 31 July 2014, whereby he dismissed the appeals on human rights grounds with reference to Article 8 of the ECHR but allowed the appeals to the limited extent that the decisions were not in accordance with the law. That conclusion related to the Secretary of State's policy in relation to dependent children of ex-Gurkha soldiers.

The Grounds of Appeal to the Upper Tribunal and submissions

3. The grounds assert that Judge Aujla erred in law in dismissing the Article 8 appeals, having concluded that were it not for s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") he would have allowed them under Article 8.
4. In the appellants' skeleton argument prepared for the hearing before the Upper Tribunal the decision in Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) is relied on in terms of the effect of ss.117A-D. Reliance is also placed on the decision in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), in terms of the weight to be afforded to the 'historic injustice' as it relates to former members of the brigade of Gurkhas.
5. It is argued that the matters identified at s.117B of the 2002 Act in terms of financial independence and whether an appellant speaks English add nothing to the public interest in the context of an 'historic wrong' case.
6. The respondent's 'Rule 24' response which can be summarised, opposes the appeal against the decision of Judge Aujla, asserting amongst other things that the judge was entitled to conclude that the effect of s.117B was such as to require him to dismiss the appeal. Reference was also made to particular findings made by Judge Aujla in relation to the concept of the 'stranded sibling' and the appellants' financial circumstances.
7. I was informed by Mr Henderson that the appellants' applications for entry clearance had again been refused by the Entry Clearance Officer ("ECO") with reference to the policy, the matter having been remitted to the ECO by Judge Aujla.
8. However, Mr Tarlow, with reference to the decision in Dube, accepted that there was an error of law in Judge Aujla's decision in terms of his having concluded that s.117 prevented him from allowing the appeal under Article 8. Mr Tarlow indicated that none of the facts were challenged on appeal to the Upper Tribunal. He did not expressly concede that in any re-making of the decision I should allow the appeal under Article 8, stating that he had no instructions on the matter.
9. Mr Henderson submitted that the decisions in Ghising and R (Gurung and others) v Secretary of State for the Home Department [2013] EWCA Civ 8 concluded that the historic injustice outweighed the public interest in immigration control. Thus, it was not necessary for appellants in the

circumstances that these appellants find themselves to show that they can support themselves without recourse to public funds.

10. In the alternative, it was submitted that there was in any event further evidence in relation to their financial circumstances.

Judge Aujla's determination

11. Judge Aujla noted that the appeal before him was based on Article 8 and the respondent's policy only. It was accepted that the appellants were not able to meet the relevant requirements of the Article 8 Immigration Rules.
12. At [16] he stated that when determining the Article 8 ground he had to have regard to the considerations in s.117B of the 2002 Act. He referred to various authorities. At [32] he stated as follows:

"I accept the evidence of the Appellants that they had no other close relatives in Nepal apart from the paternal grandfather and the aunt. The only people that the Appellants could continue to look to for guidance and financial support were their parents who were in the United Kingdom. Although the Appellants were physically separated from their family, I accept the evidence and find that the sponsor and his wife continued to provide emotional and other guidance to the Appellants as well as providing financial support to them. They could not have continued their studies without a substantial financial support from their parents over time as well as the usual emotional support. On the basis of the evidence before me, I am left in no doubt whatsoever that the Appellants did have an established family life with their parents as well as their brother."

13. At [33] he went on to find that "there were compelling circumstances surrounding the Appellants' case which included the health problems of their father and brother." The reference to the appellants' father's health problems related to the fact that he is suffering from dementia. In relation to the appellants' brother, the diagnosis in the medical evidence before the First-tier Tribunal was that he has a perinatal brain injury, resulting in various physical disabilities.
14. Before turning to Judge Aujla's consideration of s.117B, I set out the further findings. With reference to the applicable policy, which he set out at [36] of the determination, he concluded that there were "exceptional circumstances", bearing in mind the intended purpose of the policy was to keep families together and if the appellants were not permitted to enter the UK they would be separated from their parents and siblings.
15. At [41] he concluded that the appellants were young females living alone, albeit with each other and that they had no other close relatives or members of the family in Nepal. He concluded that they were wholly dependent financially and emotionally on their parents and were in his view to be regarded as 'stranded siblings'.

16. Crucially for the purposes of the appeal to the Upper Tribunal, Judge Aujla stated at [35] as follows:

“I have finally considered whether or not the decision was proportionate. However, had it not been for section 117B of the 2002 Act, primary legislation which came into force on 28 July 2014 and had effect retrospectively, I would have found that the interference in the circumstances was disproportionate. However, section 117B(3) states that it was in the public interest that persons who seek to enter or remain in the United Kingdom were financially independent because such persons were not a burden on taxpayers and were better able to integrate into society. It is clear that the Appellants would not be financially independent if they were allowed to enter the United Kingdom since they were already financially dependent on their father. Their father was himself not financially independent either because, in addition to his army pension which was his entitlement, he was in receipt of public funds in the form of housing benefit, council tax benefit and disability living allowance. The disability living allowance, although an entitlement, was meant specifically for the sponsor’s own care. The Appellants’ mother was not working either. Their brother was disabled who was also in receipt of financial assistance from the state and social care. Therefore, the Appellants would not be financially independent on arrival in the United Kingdom. Taking into account the fact that the Appellants would not be financially independent on arrival, I find that the interference with their Article 8 rights was proportionate as being in the public interest as defined in section 117B.”

17. Again in [37] he repeated that had it not been for s.117B of the 2002 Act he would have allowed the appeal on Article 8 grounds.

My conclusions

18. In the light of the concession on behalf of the respondent at the hearing before me to the effect that Judge Aujla erred in law in terms of his consideration of s.117B, I announced that I was satisfied that there was an error of law in his decision which required the decision to be set aside. Put simply, the error of law is his conclusion that s.117B prevented him from allowing the appeal under Article 8 and that but for that statutory provision the appeal would have been allowed under Article 8.
19. Notwithstanding what is said in the respondent’s ‘Rule 24’ response in terms of Judge Aujla’s conclusion in relation to the applicable policy, on the basis of what I was told at the hearing it appears that the respondent gave effect to Judge Aujla’s conclusion that the decision was not in accordance with the law, by reconsidering the applications under the policy, albeit again dismissing them. There was no appeal by the respondent against Judge Aujla’s decision to allow the appeal as being not in accordance with the law. All this puts into context the matters advanced in the Rule 24 response.
20. However, in reality I do not need to resolve the issues raised in the Rule 24 response as to whether Judge Aujla’s conclusion in relation to the policy was on the facts a sustainable conclusion. This is because, apart from the

fact that the respondent gave effect to the judge's decision by reconsidering the application, before making his assessment of the policy Judge Aujla had already concluded that but for s.117B he would have allowed the appeal under Article 8. Mr Tarlow accepted that the appeal before Judge Aujla "could have" been allowed under Article 8 and he fairly pointed out that at [33] of the determination Judge Aujla had found that Article 8 was engaged. Those observations aside, Mr Tarlow simply adopted what was said at page 3 of the ECO's notice of decision.

21. As regards that aspect of the respondent's decision, it rejects the assertion that there is family life between the appellants and the sponsor, refers to general Article 8 considerations, and suggests that the decision is a proportionate one. However, it is to be borne in mind that Judge Aujla found unequivocally that the appellants do have family life with their parents as well as their brother in the UK.
22. It is as well now to set out the provisions of ss.117A-B which state as follows:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English,

because persons who can speak English—

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to—

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.”

23. In one sense the resolution of this appeal involves nothing more than the simple task of giving effect to Judge Aujla's findings and his assessment of Article 8, of course not replicating the error in relation to the impact of ss.117A-B.
24. It is to be noted that it has not been suggested that Judge Aujla's specific conclusions in terms of whether the appellants would be financially independent on arrival in the UK are findings that he was not entitled to come to. Although Mr Henderson suggested that the appellants would be able to work when they arrived in the UK, there was little if any evidence in that respect before the First-tier Tribunal. More to the point, it does not seem to me that there was any such evidence in existence at the date of the ECO's decision.
25. Before me there was an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence, as set out under cover of a letter dated 23 February 2015. This evidence consisted of witness statements from the appellants' father and from each of the appellants. Mr Tarlow did not raise any objection to the admission of that new evidence, and although I did not give a ruling on it at the

hearing, I have decided that that evidence should be admitted, given the necessity of re-making the decision.

26. The further evidence in the witness statements, including the table of monthly income and expenditure of the sponsor, assuming all that evidence is evidence of the circumstances obtaining at the date of the decision, does not establish financial independence on the part of the appellants; on the contrary. The evidence reinforces the conclusions of Judge Aujla on that point.
27. However, as I am required to do by statute, I have regard to the matters set out in s.117B, but that is all I am required to do, to “have regard” to those matters.
28. Furthermore, it does seem to me that there is merit in what is submitted on behalf of the appellants to the effect that s.117B does not displace, dilute, or undermine the conclusions of the Upper Tribunal in Ghising at [60] as follows:

“But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant’s favour.”

The reference to Gurung is the decision in Gurung and others [2013] EWCA Civ 8.

29. It does seem to me that in this appeal it is only the legitimate aim of immigration control which the respondent relies on. There is no suggestion that there are other (adverse) factors at play militating against a grant of entry clearance.
30. It is to be remembered that financial independence is simply one manifestation of the legitimate aim contained within Article 8 of the ECHR. Article 8(2) provides that in relation to the right to respect for private and family life:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety **or the economic well being of the country**, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” [My emphasis].
31. The maintenance of effective immigration control is an aspect of the economic well being of the country and in relation to which an individual’s financial circumstances are relevant.
32. Accordingly, it is apparent that s.117B does not have the effect of displacing the jurisprudence on historic injustice in terms of it normally resulting in a decision in an appellant’s favour, other things being equal.

The considerations to which I have referred were in play in terms of “the countervailing public interest in the maintaining of a firm immigration policy” (Gurung at [41]).

33. As to whether or not the appellants are able to speak English, I note what is said in the further witness statements about their education being in English, although again it is not clear whether that was the situation as at the date of the decision. In any event, I cannot see that this is a factor which, standing in isolation, or indeed in conjunction with the financial independence issue, could outweigh the potency of the argument in favour of these appellants in terms of the historic injustice.
34. Furthermore, as I have already indicated, the matters set out in s.117B are matters that a court or Tribunal is (“in particular”) to have regard to. They do not mandate an adverse decision where a person is not financially independent or is not able to speak English.
35. In those circumstances, there does not seem to me to be any incompatibility between s.117B and the ECHR but the distinct argument in the grounds on this issue does not require detailed consideration.
36. In the light of my conclusions, I re-make the decision by allowing the appeal under Article 8 of the ECHR.

Decision

37. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made, allowing the appeals under Article 8 of the ECHR