



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: UI-2023-002593**

**HU/53810/2021**

**IA/09912/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On the 28 September 2023**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY**

**Between**

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

Appellant

**and**

**ENTRY CLEARANCE OFFICER - CITY**

Respondent

**Representation:**

For the Appellant: Mr E Wilford, Counsel instructed by Everest Law Solicitors

For the Respondent: Mr T Melvin, Home Office Presenting Officer

**Heard at Field House on 8 September 2023**

**DECISION AND REASONS**

1. The appellant appeals, with permission of First-tier Tribunal Judge Khurram, against the decision of First-tier Tribunal Judge Moffatt (the Judge) that was promulgated on 25 March 2023.
2. As I indicated at the end of hearing, I find the Judge erred in law and set aside her decision. I remake the decision to allow the original appeal. My reasons follow.

**Submissions**

3. In brief, the complaint is that the Judge's proportionality assessment under Article 8(2) failed to give appropriate weight to the historic injustice faced by Ghurkhas and their families and instead gave greater weight to the factors in section 117B(6) of the Nationality, Immigration and Asylum Act 2002, contrary to binding case law. Mr Wilford added that the balancing exercise included two irrelevant matters, being the medical condition of the appellant's brother and the motives for why the appellant's mother was pursuing the application despite being widowed, which raised further doubt as to its lawfulness.
4. Mr Melvin submitted that the decision was sustainable as the findings were ones the Judge was entitled to make from the evidence. He acknowledged that case law sets out that usually a finding of family life under Article 8(1) in similar cases would be sufficient to outweigh the public interest in maintaining the economic wellbeing of the country but reminded me that it was not automatic. As the Judge had given reasons why she departed from the usual position, there could be no legal error.

### **Reasons why there is legal error**

5. There is no dispute about the Judge's finding that family life exists between the appellant and sponsor. The challenge relates solely to whether the Judge properly carried out the necessary balancing act when assessing proportionality.
6. The case law is settled about the weight that should be given to the historic injustice and it should be given significant weight. I am grateful to Mr Wilford for his clear submissions on these matters, which has made my task much easier.
7. The importance of righting the wrong was discussed by the Court of Appeal in **Patel and others v Entry Clearance Officer, Mumbai** [2010] EWCA Civ 17, where from paragraph 11 to 15, Sedley LJ considers issues of causation, consequence and compensation, and concluded that the effect is to reverse the usual balance of Article 8 issues.
8. The fact that the historic injustice is such an important factor in the balancing exercise was confirmed by the Court of Appeal in **R (Gurung) v SSHD** [2013] EWCA Civ 8 at paragraph 41.
9. Furthermore, the Court of Appeal confirmed that the considerations arising from sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 do not make a real difference to the proportionality exercise involving the historic injustice (see paragraphs 55 to 57 of **Rai v Entry Clearance Officer, New Delhi** [2017] EWCA Civ 320).
10. This is addressed further by the Upper Tribunal in **Ghising and others (Ghurkhas: BOCs - historic wrong - weight)** [2013 UKUT 567 (IAC), where at the end of paragraph 59 the following is stated:

In other words, 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 just described.

11. The Upper Tribunal went on to explain that the respondent would need to point to matters over and above the public interest in maintaining a firm immigration policy, such as a bad immigration history and/ or criminal behaviour.
12. It follows that the Judge erred for the reasons given in the grounds and amplified by Mr Wilford. She misdirected herself regarding the weight to be given to sections 117A and 117B. She also misdirected herself by considering the medical circumstances of the appellant's brother and the motives of the appellant's mother in pursuing the appeal.

### **Remaking the decision**

13. The original decision is set aside insofar as the balancing exercise was not properly conducted.
14. The balancing exercise has to be remade. Further evidence is not needed because the facts are agreed. There is family life between the appellant and her mother. There has been an historic injustice. The burden lies on the respondent to show that there are factors sufficient to outweigh the historic injustice and none have been shown. Therefore, the balance weighs strongly in the favour of the appellant and the original appeal succeeds.

### Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

The decision is set aside.

I remake the decision and allow the appeal in respect of Article 8.

**Judge John McCarthy**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**Date 20/09/2023**