



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2024-000903
and UI-2024-000904

First-tier Tribunal No:
HU/00701/2023, HU/00703/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 9th of October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

**MISS BHIM KUMARI SUNUWAR
MR RABIN SUNUWAR**

Appellants

and

The Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr D Shrestha, counsel of Castle Street Chamber
For the Respondent: Ms McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 24 April 2024

DECISION AND REASONS

Introduction

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Clarkson heard via CVP on 25 September 2023 and promulgated on 6 November 2023.
2. The grant of permission stated *“The grounds disclose no arguable material error of law save for the 4th ground. It is arguable that the decision did not give sufficient weight to the historic injustice if it was*

established that the appellants would have sought to reside in the UK at the time that the late father was discharged from the Army”.

3. The Upper Tribunal regrets the delay in promulgating this judgment. The appeal was heard on the basis of submissions alone with no oral evidence. I have a clear note of the submissions of both parties and also all of the material which was before the First-tier Judge. I reached my decision shortly after the hearing.

Anonymity

4. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

5. The background is that the appellants are Nepalese nationals. They are siblings and their dates of birth are 11 July 1982 and 1 January 1990. They applied on 26 December 2022 for entry clearance as the adult dependent children of their mother, Chowan Kumari Sunwar, who is the widow of their father, Khadga Bahadur Sunuwar. He served as a soldier in the Brigade of Gurkhas from October 1957 until December 1971, in which time he served in various places in southern and eastern Asia and was awarded the General Service Medal with Clasp Malaya. Having achieved the rank of Corporal with Exemplary Military Conduct he was discharged.
6. Those applications were refused by decisions of the respondent dated 6 March 2023. They were considered not to meet the eligibility requirements for adult dependent children in the discretionary policy for Gurkhas discharged before 1 July 1997 and their family members, and they also did not meet the eligibility requirements of Appendix FM. Their applications were considered outside the Immigration Rules by reference to Article 8 and to the case law concerning Gurkhas and the historic injustice which prevented them from settling in the United Kingdom, in particular *Gurung v SSHD* [2013] EWCA Civ 8 and *Ghising* [2013] UKUT 00567, as well as *Kugathas v SSHD* [2003] EWCA Civ 31.
7. The respondent was not satisfied that the appellants were affected by the historic injustice, and did not accept that there was family life between the appellants and their mother over and above that which would ordinarily be expected between an adult child and parent. It was not accepted that Article 8 was engaged, but if it was, any interference with protected rights was proportionate.

The decision of the First-tier Tribunal

8. The appellants appealed against that decision. First-tier Tribunal Judge Clarkson found that the Appellants were aged 32 and 40 years old and were single. They had lived apart from their parents since 2011, i.e. 11 years before this application was made, and were not dependent on their

parents beyond the usual emotional ties, and they had not established that they had been negatively affected by the historic injustice.

The grounds of appeal

9. Permission to appeal was sought on 6 grounds, which were that the judge (1) failed to consider evidence of financial support, (2) failed to consider evidence of emotional support, (3) incorrectly speculated that the appellants were employed, (4) had not considered the historic injustice correctly, (5) applied the wrong test for evidence of necessity on the appellant's mother, and (6) had not considered the mother's medical conditions.

10. Permission to appeal was granted by First-tier Tribunal Judge Austin on 25 January 2024 in limited terms:

The grounds assert that the Judge erred in making material errors of law on 6 different issues. The grounds disclose no arguable material error of law save for the 4th ground. It is arguable that the decision did not give sufficient weight to the historic injustice if it was established that the appellants would have sought to reside in the UK at the time that the late father was discharged from the Army.

11. The respondent filed a Rule 24 response dated 5 April 2024. In it, the appeal was opposed, with the following comments being made:

3. The Respondent opposes the appellant's appeal for the following reasons. Permission to appeal has been expressly limited by FtTJ Austin to a single ground - ground four. Should there be any dispute about the limited nature of the grant of permission, the Respondent would rely on Safi & Ors (permission to appeal decisions) [2018] UKUT 388 (IAC).

4. The Respondent's primary position is that any error in ground four is plainly immaterial. That is because the error complained about only goes to the Judge's assessment of proportionality. However, there is no challenge (on which permission has been granted) to the Judge's assessment of whether Article 8 is engaged (see §61). The Judge's findings on proportionality are simply findings in the alternative (see §62). Given the Judge's finding that Article 8 is not engaged, any error on proportionality must be immaterial.

5. In summary, the Respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.

The error of law hearing

12. The hearing was held in person at Field House.

13. Mr Shrestha for the appellants submitted that the issue for the Upper Tribunal was whether the appellants had a bad criminal history. If they did not have such a history, then the proportionality analysis favoured the

appellants, and he relied on the authorities of *Ghising* [2013] UKUT 567 and *Gurung* [2013] EWCA Civ 8.

14. He cited the Court of Appeal judgment of *Rai v ECO* [2017] EWCA Civ 320 as authority for the proposition that an appellant only had to show that there was real and committed support for the parent in order for the appeal to be allowed.
15. He argued that the judge had been wrong in the analysis of proportionality and Article 8(2), and that the Judge had incorrectly understood the emotional ties. He drew my attention to the fact that the respondent had not been present or represented at the hearing before the Judge, and so any concerns which the respondent may have had about credibility had not been put to the appellants in cross-examination.
16. The Presenting Officer Ms McKenzie pointed out that some of the appellant's oral submissions went beyond the limited scope of permission granted by First-tier Tribunal Judge Austin. She focussed her argument on ground 4, in respect of which permission had been granted.
17. She submitted regarding the historic injustice that it was plain from the decision letters and the Judge's decision that both were directed squarely at the issue of the historic injustice. The Judge had cited *Ghising* at [9] and elsewhere in the judgment, and had dealt accurately with historic injustice.

Analysis

18. The treatment of the family members of Gurkha soldiers and the historic injustice was considered by the Court of Appeal in *Pun (Nepal) v SSHD* [2017] EWCA Civ 2106. The Court held that the policy of redressing the historic injustice which had prevented Gurkhas from settling in the UK carried far less weight where non-dependent adult relatives of a Gurkha applied for indefinite leave to remain than it did when dependent relatives applied.
19. Longmore LJ reviewed various authorities including *Rai v ECO* [2017] EWCA Civ 320 and *Patel v Entry Clearance Officer (Mumbai)* [2010] EWCA Civ 17 and stated at paragraph 23 that
"We do not read the decision[s] ... as mandating that the correction of the historic injustice in that case (or in the Gurkha cases) requires those, who have no dependency at the time of application, to be registered as British citizens or be entitled to permanent settlement."
20. Accordingly the appellant's citation of *Rai* is at odds with Court of Appeal authority which is binding on the Upper Tribunal. The law does not require that their appeal should therefore be allowed.
21. The appellant relied on *Ghising* and *Gurung*. However, these cases are distinguishable from the present case. Both cases were concerned with

dependent children of Gurkha veterans who had settled in the United Kingdom – see paragraph 1 of each of the judgments.

22. In *Gurung*, the Court of Appeal also held that the historic injustice was a factor to be taken into account but it was not determinative on its own, and was only one of the relevant factors to be considered.
23. Judge Clarkson analysed the issue of whether the appellants were dependent on the sponsor at paragraphs 37-47 of the judgment before concluding in clear terms at paragraph 47 that dependency had not been shown. There is no permission to appeal against that finding – see the limited terms of Judge Austin’s grant of permission cited above.
24. It is not the case that the Judge failed to consider the Gurkha historic injustice.
25. Judge Clarkson was clearly very much aware of the historic injustice – the relevant case law and policies were considered at paragraphs 22-33 of the judgment, and the judge made detailed factual findings concerning the appellants and their claimed dependency upon their mother. The judge took account of their accommodation, employment and financial circumstances and found as a fact that there was no dependency. It was not accepted that Article 8 was engaged, and in the alternative if it was engaged, the decision was proportionate.
26. It is unsurprising that the judge focussed correctly on the issue. The decision letters explicitly cited both *Gurung* and *Ghising* and stated that the appellants had not been affected by the historic injustice and family life had not been established over and above that which would ordinarily be expected between an adult child and his/her mother.
27. The judge considered the historic injustice in line with the case law and the respondent’s policies and came to properly reasoned conclusions on the facts and on the law. There is no legally sound criticism to be made of her judgment.

Decision

28. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

John Jolliffe

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 October 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. **The date when the decision is “sent” is that appearing on the covering letter or covering email**