IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004296
UI-2024-004295

First-Tier Tribunal No:
HU/63935/2023; LH/02488/2024
HU/63944/2023; LH/02490/2024

THE IMMIGRATION ACTS

Decision and Reasons Issued:
On 2 January 2025

Before

UPPER TRIBUNAL JUDGE RUDDICK
DEPUTY UPPER TRIBUNAL JUDGE D CLARKE

Between

SITA RAI
UNISHA RAI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K. McCarthy of Counsel, instructed by Everest Law Solicitors
For the Respondent: Ms Nwachuku, Senior Home Office Presenting Officer.

Heard at Field House on 2 December 2024

DECISION AND REASONS

INTRODUCTION

1. The Appellants appeal against the decision of First-Tier Tribunal Judge Chong promulgated on 27 June 2024 ("the Decision") dismissing their appeals against the Respondent's decisions dated 2 November 2023, refusing them entry clearance.

RELEVANT BACKGROUND

2. The Appellants are Nepalese nationals. The first Appellant was born on 3 June 1979, and she is the mother of the second Appellant, who was born on 18 November 2010. The Appellants reside in Nepal and the UK Sponsor was father to the first Appellant and grandfather to the second Appellant.

3. The Appellants applied for indefinite leave to enter on 19 September 2023, as the adult dependent child, and as the dependant grandchild, of a former Gurkha discharged prior to July 1997. The Respondent refused both applications in her Reasons for Refusal Letters ("RFRL") dated 2 November 2023.

4. In respect of the first Appellant, the Respondent noted that the application was made as "an adult child of Gurkha discharged prior to 1 July 1997" and that the Sponsor had been granted settlement on 2 November 2023. The Respondent considered the application under the Appendix Adult Dependant Relative ("ADR") rules, a policy referred to as the "adult child of a former Gurkha" policy (the "Policy") and Article 8 of the European Convention on Human Rights ("ECHR"). Whilst the RFRL states that section 55 of the Borders, Citizenship and Immigration Act 2009 was taken into account, there were in fact no findings in this regard.

5. In summary, the Respondent refused the first Appellant's application under Appendix ADR as she was not satisfied, "that you require, due to either age, illness or disability, long-term personal care to perform everyday tasks". In terms of the Policy, the Respondent found that it was not met because the Appellant was not between the ages of 18 – 30, she was not financially and emotionally dependent upon her Sponsor and she had previously established an independent family unit, albeit that she was now divorced. In terms of Article 8, the Respondent found that there was no family life and therefore Article 8 was not engaged. In the alternative, even if Article 8 was engaged, the historic injustice was insufficient to outweigh the public interest.

6. In respect of the second Appellant, the Respondent found that “other dependent relatives will not qualify for the exercise of discretion in line with the main applicant and must qualify for leave to enter or remain in the UK under the relevant provisions of the immigration rules in their own right”. In consequence of this, the Respondent considered the second Appellant under rule 297 and Article 8 ECHR. Again, whilst reference is made to s.55 of the 2009 Act, no substantive findings are made. There was no consideration of historic injustice at all.

7. In summary, the Respondent refused the second Appellant under r.297(i)(a) – (f), (ii) and (iii) and then went on to find that there were no “exceptional circumstances” to warrant “a grant of entry clearance outside the rules”.

8. The Appellants appealed the Respondent’s decisions to the First-Tier Tribunal and the matter came before First-Tier Tribunal Judge Chong on 13 June 2024.

9. In summary, the Judge invoked Gurung v SSHD [2013] EWCA Civ 8 and Ghising [2013] UKUT 567 (IAC) and concluded at [32] that both Appellants had re-established a family life with the Sponsor since 2016, such that Article 8 was engaged.

10. The Judge then turned his attention to the issue of proportionality, finding at [34] that,

> “The Respondent does not dispute that the Sponsor and Appellants suffered historic injustice as the Sponsor was discharged from the Brigade of Gurkhas in 1963. […] I accept that the Sponsor and Appellants had suffered historic injustice”.

11. We pause here to note that this historic injustice finding evidently pertains to both Appellants and the Respondent has not cross-appealed this finding.

12. The Judge then found at [35],

> “However, I do not agree with Ms Childs’ submission that unless the Respondent relies on something more than the ordinary interests of immigration control, the historic injustice will normally require a decision in the Appellant’s favour”.

13. In the next paragraph at [36] the Judge invokes [41] of Gurung, and notes that the "historic injustice is an important factor to be taken into account in the balancing exercise" but it is "only one of the factors to be weighed against the need to maintain a firm and fair immigration policy". The Judge then self-directs at [38] that, "it is ultimately for the Court to strike its own balance".

14. In striking such a balance the Judge adopted a balance sheet approach at [40], setting out matters on the Appellants' side of the balance, including the historic injustice. He then went on at [41] to purport to identify matters weighing against the Appellant. These included that:

    i) the requirements of immigration control, "weigh[ed] heavily in favour of refusal" because the Appellants did not meet the Rules,
    ii) that "one of the main reasons" the Appellants wished to come to the UK was so that the First Appellant could care for their sponsor, but his care needs were already being reasonably well met by other relatives; this was a factor attracting "strong weight […] against granting leave",
    iii) the "other purpose" of the application was so that the granddaughter could be educated in the UK, and as this application was made on the basis of family life, this motivation carried "moderate weight […] against the grant of leave",
    iv) family life could be maintained by the Sponsor's visits to Nepal and through modern means of communication; this carried "moderate weight […] against the grant of leave",
    v) the Appellants' current accommodation arrangements and receipt of financial support could continue; this factor carried "small weight […] against granting leave".

15. The Judge then attached neutral weight to the other factors in 117B of the 2002 Act and found the decision to refuse entry clearance was proportionate. In his conclusion at [47], the Judge found,

> "I have accepted as above that the Sponsors and the Appellants suffered as a result of the historic injustice and I have attached appropriate weight to that as a factor in favour of grant of leave in the proportionality assessment. To say that the Appellants had suffered financially because she was deprived the opportunity to be born in the UK, receive education in the UK and have a better prospect of a well-paid job or career in the UK is going too far. Different people make different life choices, even those born in the UK and those we [sic] receive education here. […] The historic injustice had not prevented the Sponsor or the Appellants to live a reasonably normal life. For the reasons above, I do not find that refusal of leave would result in unduly

> harsh circumstances which prevented the Sponsor and the Appellants to continue family life."

PERMISSION TO APPEAL

16. The Appellants applied for permission to appeal and on 30 September 2024 Upper Tribunal Judge Lodato granted permission. Judge Lodato found it arguable that the Judge,

> "misapplied the guidance in R (Gurung) v SSHD [2013] EWCA Civ 8 and R (Ghising & Others) v SSHD (Gurkhas/BOC: historic wrong; weight) [2013] UKUT 567 (IAC) in failing to attach sufficient weight to the historic injustice which would ordinarily result in a finding of disproportionality in a case such as this once it was found that family life was engaged."

17. In summary, the Appellants' ground of appeal is that, in circumstances where family life and historic injustice are accepted by the Judge, the FTIJ failed to apply the guidance in the relevant authorities. This required him to identify matters over and above the ordinary interests of immigration control in order to reach a lawful finding that refusal of entry clearance was proportionate.

18. There was no rule 24 reply from the Respondent.

19. The matter now comes before us to determine whether there is an error of law in the Decision of the Judge pursuant to s.12(1) of the Tribunal Courts and Enforcement Act 2007. If we find an error, we must then determine whether the error is material, such that the Decision should be set aside. If the decision is set aside, we must decide whether to remake the decision in the Upper Tribunal or remit the appeal to the First-Tier Tribunal, pursuant to s.12(2) of the 2007 Act.

20. We had before us a stitched bundle comprising of 145 pages, which the representatives confirmed that they had read.

Error of Law Hearing

21. At the outset of the hearing before us, Ms Nwachuku confirmed that she had no concessions to make in respect of the pleaded grounds. Given the clear and narrow point articulated in the grounds of appeal, we invited the Respondent to address us first. In so doing, we took Ms Nwachuku through the key points in the Decision, as set out above,

and indicated our preliminary view that paragraph 35 of the Decision appeared unreasoned in the light of Gurung and Ghising, as summarised at headnotes (3) – (5) of Ghising.

22. Ms. Nwachuku accepted that the Appellants' submission that the Judge had rejected at [35], was indeed drawn from the guidance in Ghising. Ms Nwachuku stated that she was unsure why "the Judge phrased it in this way" but nonetheless, the outcome of the appeal would have been the same. Ms Nwachuku argued that the Ghising guidance does not amount to a "slam dunk" for the Appellants, a proportionality assessment is still required and the weight to be attached to the various factors in the proportionality assessment was ultimately a matter for the judge.

23. We then took Ms Nwachuku to the factors at [41], which purport to weigh against the Appellant. We asked whether, given the reduced weight attached to the ordinary requirements of immigration control in cases involving historic injustice, there was anything that she could identify within the Judge's reasoning, whether individually or cumulatively, that could be viewed as compelling enough to outweigh the Appellants' side of the balance. Ms Nwachuku replied that the Judge had had the benefit of hearing oral evidence and as such, it was perfectly open to him to apportion the weight that he did.

24. We invited Ms McCarthy to reply. Ms McCarthy argued that whilst there was no "slam dunk", the authorities clearly identify a requirement for weighty matters over and above ordinary immigration control, such as criminality or abuse of immigration law, to outweigh the Appellant's side of the balance.

25. Having heard submissions from Ms McCarthy and Ms Nwachuku, we indicated that we would reserve our decision and provide that in writing with our reasons. We now set our reasoning and decision as follows.

DISCUSSION

26. Before substantively considering the ground of appeal, it is convenient to begin this discussion by considering the proportionality task before the Judge, in the light of s.117B of the 2002 Act and the relevant authorities. Gurkha veterans and their family members are subject to immigration control in the same way that any foreign national without a right a right of abode under s.1(1) of the

Immigration Act 1971 is subject to immigration control. We recognise that the immigration rules are the lens through which the requirement of maintaining effective immigration control is to be viewed under 117B (1). See Agyarko [2017] UKSC 11 [46- 47]. In the present case, the Appellants accept that they cannot meet the requirements of the Immigration Rules.[1]

27. The Respondent's decision letter in respect of the first Appellant, refers to an "adult child of a former Gurkha" policy (the "Policy"). We find that the "Policy" referred to in the RFRL is the concessionary policy found in Annex K of the Chapter 15 Section 2A "Persons Seeking Settlement: HM Forces" IDI. This concessionary policy was brought in to correct the historic injustice suffered by Gurkha veterans, who were treated less favourably than comparable non-British Commonwealth soldiers (for the history of this policy see Gurung at [2] – [11]).

28. For the purposes of understanding the parties' position on the correct approach to the Article 8 proportionality assessment, paragraphs 26 and 27 of this Policy expressly require case workers to apply Ghising and Gurung, when undertaking an Article 8 proportionality assessment.

29. In terms of the approach taken in the case law, we note that both Ghising and Gurung focused on the "weight" to be attached to the historic injustice when considering proportionality. For example, in Gurung at [35], the Court of Appeal framed the issue of historic injustice in terms of "what weight should be given to it."

30. In answering this question, the Court of Appeal at [38] again framed the relevance of the historic injustice in terms of a feature carrying weight on the Appellant's side of the balance,

> "We accept the submission of Ms McGahey that the historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration policy."

[1] We note that the immigration rules at the date of decision on 2 November 2023 included the new "Appendix Gurkha and Hong Kong military unit veteran discharged before 1 July 1997" ("App AF"), which was inserted into the immigration rules by the HC1780 statement of changes dated 7 September 2023. App AF now seeks, in part, to deal with adult child dependants of Gurkha veterans discharged before 1 July 1997. However, the statement of changes makes clear that this Appendix did not come into force until 5 October 2023 and did not apply to applications made prior to 5 October 2023, such applications to be decided in line with the immigration rules in force on 4 October 2023. App AF was therefore irrelevant to the issues before the Judge, and we do not take it into account.

31. In Ghising the Upper Tribunal in following the Gurung approach to weight carried by the historic injustice, concluded at [59],

> "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."

32. The consequence of this approach of balancing the historic injustice against the public interest in maintaining a firm immigration policy is set out in headnotes (4) and (5) Ghising, in that,

> *(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) [.....] 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.*

33. In the case of Patel (historic injustice; NIAA Part 5A) [2020] UKUT 00351(IAC), President Lane, in his consideration of AP (India) v Secretary of State for the Home department [2015] EWCA Civ 89, described a different way of viewing the relevance of historic injustice to the proportionality balance at [38],

> "Elias LJ noted that the Secretary of State had subsequently accepted that, if the only factor weighing on the government's side of the balance was the importance of maintaining a firm immigration policy, the historic injustice in the BOC and Gurkha cases will, in fact, be decisive. In other words, provided that a protected family or private life exists, the historic injustice robs the government's side of the balance of all weight, thereby effectively guaranteeing success for the individual"

34. In this approach, rather than the historic injustice weighing on the Appellant's side of the balance, it is not weighed at all. Instead, the historic injustice falls to be considered in terms of its effect on the public interest in maintaining a firm immigration policy, robbing it of all weight. This is because the public interest in maintaining a firm immigration policy today, is undermined by the unjust treatment suffered in the past. As reasoned in Patel at [39],

> "What characterises the BOC and Gurkha cases is that they involve the belated recognition by the United Kingdom government that a particular class of persons was wrongly treated, in immigration terms, in the past; and that this injustice should be recognised in dealing with relevant applications made now. The injustice does not mean that the clock is somehow turned back. The person concerned still needs to bring themselves within the ambit of Article 8 ECHR, so as to require the Secretary of State to justify her interference with that right. However, once that point is reached, and the proportionality scales are set, the historic injustice operates so as to preclude the Secretary of State from requiring that any material weight be given to the importance of maintaining firm immigration controls."

35. Ghising is therefore correct in its requirement of matters over and above the public interest in maintaining a firm immigration policy, such as a bad immigration history and/or criminal behaviour. However, such matters "over and above" are not required to outweigh the historic injustice but are instead required to outweigh the protected family or private life that exists on the Appellant's side of the balance.

36. In the light of these authorities, it is plain to us that Ms Childs's submission at [35] encapsulated both the Ghising guidance and the Respondent's policy concession in terms of the correct approach to the Article 8 proportionality balance. Indeed, Ms Nwachuku's accepted in her oral submissions that this submission reflected the guidance in Ghising.

37. We find that that the Judge has failed to identify any lawful reason for departing from the requirement that "something more than the ordinary interests of immigration control" is required. The fact that the Judge at [36] - [38] notes that Gurung found that "historic injustice is an important fact to be taken into account", that "historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration" and that "it is ultimately for the court to strike the balance", is not, we find, anything to the point.

38. We find, in the light of Patel that it is clear that the Judge erred in finding that "the requirements of the immigration rules [……] weigh[ed] heavily in favour of refusal". It is clear to us that none of the factors identified by Judge Chong as weighing against the Appellant's protected family at [41], can rationally be described as matters "over and above the public interest in maintaining a firm immigration policy". We find that Judge Chong has simply listed the current consequences of the historic injustice and no more.

39. We therefore find that the Judge materially erred as pleaded in the grounds before us.

CONCLUSION ON THE ERROR OF LAW

40. For our reasons above, we find that the decision of the First-tier Tribunal discloses material errors of law and must be set aside. We find that the errors were specific to the Judge's application of the law and therefore the findings of fact should stand.

DISPOSAL

41. In terms of disposal, we invited submissions from the representatives in the light of the rule 15(2A) evidence, which sadly confirms that the Sponsor has now died. We pointed out that it appeared to us that this placed the Appellants in difficulty because the required jurisdictional family life hook in the UK had disappeared. We therefore invited the parties to address us on whether: another form of family life had been relied upon before the First-Tier Tribunal, and if not, whether another form of family life would be relied upon at any remaking of the appeal, and if so, whether this was a new matter for the purposes of s.85 of the 2002 Act.

42. Ms McCarthy indicated that she would like to take instructions, so we put the matter back until after we heard the next case on our list. When we resumed the hearing, Ms McCarthy confirmed that family life with the first Appellant's niece, Jyoti Kala Rai, and her husband Rajesh Rai (both of whom reside in the UK), would be relied on in any remaking of the First-Tier Tribunal's decision.

43. Ms Nwachuku in reply, indicated that the parties had now agreed that the suggested family life with Jyoti Kala Rai, and Rajesh Rai was a new matter, she invited us to retain the matter in the Upper Tribunal

but said that she would need to take instructions on whether permission would be given for the new matter to be considered by the Tribunal.

44. After our list was concluded, we received a message in chambers from Ms Nwachuku confirming that the Secretary of State had now given permission for the Tribunal to consider the new matter.

45. In deciding whether to retain this matter in the Upper Tribunal or whether to remit the matter to the First-Tier Tribunal, we are mindful of the guidance in Begum [2023] UKUT 00046, when considering whether to depart from the general principle that cases should be retained in the Upper Tribunal for remaking,

> *(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.*

46. We find in the light of the new matter, that an extensive fact-finding exercise will now need to be undertaken. We are also mindful that this new factual matrix has not previously been considered by the Tribunal, and in such circumstances, it would be unfair to restrict the Appellants' appeal rights.

47. We therefore consider it appropriate to remit the Appellants' appeals to the First-Tier Tribunal to be reheard with all findings of fact preserved.

NOTICE OF DECISION

1. The Decision of the First-tier Tribunal dated 13 June 2024 involves the making of an error of law.

2. We set aside the Decision preserving all findings of fact.

3. We remit these linked appeals to the First-Tier Tribunal to be heard by any judge other than First-Tier Tribunal Judge Chong.

D. Clarke

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
4th December 2024