Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/09754/2011
OA/11414/2011
IA/18389/2011
OA/22874/2010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 September 2014	**On 4 December 2014**

Before

LORD BOYD OF DUNCANSBY
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE WARR

Between

GYANENDRA RANA
NORESH RAI
SHANI GURUNG
REMESH GURUNG

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Howells
For the Respondent: Mr Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These four appeals have come before the Upper Tribunal by order of the Court of Appeal dated 14 February 2013. These follow from appeals of the Upper Tribunal and the reported Court of Appeal decision Gurung & Others

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v Secretary of State for the Home Department [2013] 1WLR 2546. All of these cases involve what might be called the historical wrong which was suffered by the men and families of Gurkhas serving in the British army who, until the reversal of the decision by the Home Office, had been denied entry into the United Kingdom for settlement. A number of cases have been heard both in the Upper Tribunal and in the Court of Appeal and it is not necessary for us to look at these particularly in light of the attitude which has been adopted by the Presenting Officer for the Home Office in this case.

2. The reasons why the decisions in the Upper Tribunal were set aside are given in the decision of the Master of the Rolls in Gurung and in particular at paragraphs 40 to 42 and 45 to 46. Some of these decisions had been overturned in their entirety, others simply on the basis of the assessment of proportionality under Article 8(2).

3. Turning to the individual appeals, appellant (1) who is Gyanendra Rana, that one was set aside insofar as it related to the question of proportionality under Article 8(2). In a decision promulgated on 11 April 2012 Mrs Justice Ryan, sitting as a Judge of the Upper Tribunal with Upper Tribunal Judge Jordan accepted that a family life had been established and that is seen in paragraphs 59 to 65 of the determination but then found that on applying the principles of proportionality, considered that removal was justified and proportionate because of the public interest in firm and consistent immigration policy. It is clear from the decision in Gurung that that was an error of law and falls now to be re-made.

4. In the case of Ghising (number 2) [2013] UKUT 00567 (IAC) the Tribunal said at paragraph 59 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 the appellant’s favour and the explanation for that was to be found not in the concept of any new or additional burdens but rather that in the weight to be afforded to the historic wrong of settlement. That principle is not contested by Mr Walker, appearing for the Home Office.

5. Having heard today from Mr Gyanendra Rana’s mother, the widow of a Gurkha officer, it is clear to us that when he retired in 1991 after 27 years’ service he would, had he been able to, have come to the UK and settled here and the reason that was given was in order to provide for a better life for his family and for his children. There has been no submission made to us that there has been any other reason to refuse this appeal on the basis of public policy and in those circumstances we allow that appeal.

6. The next appeal which was argued was that of the fourth appellant, Mr Remesh Gurung. The same considerations apply in relation to this one. The Tribunal’s decision was overturned insofar as it related to the proportionality assessment under Article 8(2). In this case Deputy Upper Tribunal Judge Lewis in a determination dated 31 January 2012 had dismissed the appeal against the refusal of leave to enter which is dated 4 August. He found at paragraph 16 of his determination that a family life

had been established, however at paragraph 21 he said that the long overdue recognition that Gurkhas should have their service to this country rewarded by being allowed to settle here does reduce the weight to be put into the public interest side of the balance even if not by very much. So he went on "the issue is as always the weight to be attached to it as one of the factors in the Article 8 balance. In this case it seems to me that the weight should be limited." That was a clear error of law. The Court of Appeal disagreed with it and so it remains to us to re-make that. In this case we heard evidence from Mr Remesh Gurung's father who served for 22 years in the Gurkhas, retiring in 1986. Mr Remesh Gurung was born in 1988, however Mr Gurung Senior gave evidence that if he had been allowed to apply to settle in the UK in 1986 would he have done so and he said that he would have done so and would have applied as a family. Accordingly it is clear that had he done that Mr Remesh Gurung would have been born in the United Kingdom and would have been here as a member of his family. Accordingly we are satisfied that family life would have been established here in the UK at that time. Again no reasons have been put before us as to why the public interest should require that the appeal be refused and accordingly we allow it.

7. The second appellant is Mr Noresh Rai. His one is slightly different in the sense that the reasons for the setting aside were given in paragraphs 8, 31, 33, 36 and 37 of the skeleton argument before the Court of Appeal and in the judgment of Master of the Rolls in Gurung at paragraphs 45 to 46. The First-tier Tribunal and the Upper Tribunal found that family life had not been established. However, before us Mr Howell submitted that that was wrong. He referred us to Ghising (Number 1) (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC) at paragraphs 53 to 72 and in particular to the way in which the Upper Tribunal had considered the issue of an adult being part of a family when they formed an independent life. In this case it was submitted that the appellant was part of a family life and that was the reason set out in paragraph 16 of the skeleton argument. We do not need to rehearse the issues there, no issue was taken with it and therefore we find that family life in terms of Article 8(1) has been established.

8. We then pause for us to look at the issue of proportionality. Mr Howells submitted that there can only be only be one outcome to this, that having engaged Article 8(1) the proportionality should be assessed in the same way as the other cases to which we have referred and we agree with that and allow the appeal.

9. Appellant (3) is Shani Gurung. This is an appeal by the Secretary of State for the Home Department. First-tier Tribunal Judge Lingard had in his judgment carefully considered the issue of whether or not family life was established and came to the conclusion that it was. That was overturned by Judge Freeman in the Upper Tribunal. Judge Lingard's determination was promulgated on 2 August 2011 and the relevant paragraphs are those contained at paragraphs 3, 15, 18 and 31 through to 39. Upper Tier Tribunal Judge Freeman in a determination promulgated on 9 December 2011 overturned that and Mr Walker, in his submissions, accepted that it would be very difficult now to argue, given the passage of time in the

cases which have followed during this, that family life was not established and while he was not conceding the point he did not appear to be supporting the decision of the Upper Tribunal Judge. Accordingly, we shall refuse the appeal in that case.

DECISION

Appeals of first second and fourth appellants allowed, appeal of respondent in the case of the third appellant dismissed.

Lord Boyd of Duncansby

4 December 2014