Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15287/2011
OA/15291/2011
OA/15303/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 September 2014	**On 24 September 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

TRISHNA THAPA
TRIPTI THAPA
SAURAV (AKA SHAURAV) THAPA

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr E Wilford, instructed by Howe & Co, Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Nepal and were born respectively 13 June 1988, 28 August 1989 and 4 March 1991. They had appealed against decisions of the Entry Clearance Officer, New Delhi, dated 27 April 2011 refusing their applications for entry clearance as the over age dependent children of Ram Bahadur Thapa, a former Ghurkha soldier (hereafter Mr Ram Thapa). Mr Thapa had been granted settlement in the United Kingdom on 9 November 2009.

2. The First-tier Tribunal (Judge Whalan), in a determination promulgated on 2 November 2011, allowed the appeal of the appellants' mother (Bhim Kala Thapa) but dismissed the appeals of the appellants. They appealed to the Upper Tribunal (Judge Storey) which, in a determination promulgated on 25 July 2012, dismissed the appeal. Permission to appeal to the Court of Appeal was refused by Judge Storey but subsequently granted by Laws LJ. A consent order was sealed on 2 December 2013 providing for Judge Storey's determination to be set aside and the appeal remitted to the Upper Tribunal for rehearing. The material part of the Statement of Reasons reads as follows:

> (v) For the purposes of this appeal, the respondent agrees that the determination of Upper Tribunal Judge Storey contained a material error of law in light of **R (Gurung) v Secretary of State for the Home Department [2013] 1WLR 2546** (in consequence of which that part of **Ghising** which relates to Article 8(2) was set aside).
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> (vi) The parties therefore agree that this amounts to a sufficiently material error of law to warrant the appeal being allowed and the case remitted back to the Upper Tribunal (Immigration and Asylum Chamber) for a rehearing on the issue of Article 8(2) in line with **R (Gurung)**.

3. At the Upper Tribunal hearing at Field House on 1 September 2014, I admitted the witness statement of Mr Ram Thapa dated 1 September 2014. Mr Thapa was in court and adopted the statement as his evidence. He was not cross-examined and Mr Wilding did not seek to challenge any part of his evidence in submissions. I accept the evidence contained in that statement that Mr Ram Thapa had no opportunity of applying for settlement together with his dependent family after his discharge from the British Army in July 1991 and also that he would have applied for settlement together with his dependant family had he had the opportunity to do so at that time.

4. Mr Wilding, for the respondent, accepted that the respondent had made no challenge whatever to the factual matrix in this case and further accepted that the respondent's only ground for asserting that the refusal of the applications was proportionate by reference to Article 8(2) of the ECHR was that concerned with the maintenance of immigration control (as part of a wider aim in protecting the economic wellbeing of the United Kingdom). He made no further submissions.

5. Mr Wilford, for the appellants, referred me to the determination of the Upper Tribunal in **Ghising and Others (Ghurkhas /BOCs, historic wrong; weight) [2013] UKUT 00567 (IAC)**:

> *(1) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.*
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> *(2) When an Appellant has shown that there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware).*
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> *(3) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight.*
>
> *(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.*
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> *(5) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. 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.*

6. Mr Wilford alsio relied upon the determination at [60]:

> Once this point is grasped, it can immediately be appreciated that there may be cases where Appellants in Gurkha cases will not succeed, even though their family life engages Article 8(1) and the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here on completion of his military service. If the Respondent can point to matters over and above the "public interest in maintaining of a firm immigration policy", which argue in favour of removal or the refusal of leave to enter, these 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. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a "trump card", in the sense that not every application by such a person will inevitably succeed. 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.

7. Having accepted the evidence in Mr Ram Thapa's most recent statement, I am drawn to the inevitable conclusion that these appeals should be allowed. The respondent relies only upon the maintenance of immigration policy as proportionate justification to the refusal of these applications; there is no evidence at all of criminal behaviour or a bad immigration history attaching to any of these appellants. Applying the *ratio* of **Ghising** to the agreed facts in these appeals, I find that they should be allowed. I note, however, that the consent order in the Court of Appeal is somewhat ambiguous. The order provides at [1] that the "determination of the Upper Tribunal ... promulgated on 2 November 2011 be set aside ..." the determination of 2 November 2011 and that of the First-tier Tribunal, not the Upper Tribunal. I assume, therefore, that the consent order purported to set aside Judge Storey's determination promulgated on 25 July 2012. I therefore set aside the determination of the First-tier Tribunal dated 2 November 2011 and remake the decision. The appeals of the appellants against the decisions of the Entry Clearance Officer and which are dated 27 April 2011 are allowed on human rights grounds (Article 8 ECHR).

THE DECISION

8. The determination of the First-tier Tribunal promulgated on 2 November 2011 is set aside. I remake the decisions. The appeals of these appellants against the decisions of the Entry Clearance Officer dated 27 April 2011 are allowed on human rights grounds (Article 8 ECHR).

Signed Date 10 September 2014

Upper Tribunal Judge Clive Lane