IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00395/2014

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Decision & Reasons Promulgated**
On 18 August 2015	**On 7 September 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR INDRA BAHADUR MAGAR
(ANONYMITY DIRECTION NOT MADE)

<u>Appellant</u>

and

ENTRY CLEARANCE OFFICER – NEW DELHI

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Ms S Akinbola, Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

<u>DECISION AND REASONS</u>

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Horvath dismissing his appeal against the refusal by the Entry Clearance Officer to grant him entry clearance to join his sponsor for settlement as his dependent son under the discretion provided for in the Secretary of State's published policy in relation to the dependants of Foreign and Commonwealth HM Forces Members and under Article 8 ECHR. The appellant applied together with his parents, whose applications were approved but his was rejected.

2. The appellant is a national of Nepal born on 2 October 1988.

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3. His father and sponsor was a Gurkha who was discharged from the army in 1984. The appellant with his parents made an application on 17 September 2013 to accompany his parents for settlement in the United Kingdom. Following an interview on 12 November 2013, the application of his parents was approved but his was refused on 3 December 2013. At the date of the refusal of his application both his parents were still in Nepal. His father left Nepal on 15 December 2013 and his mother left in August 2013, some eight months later.

4. At the date of application and decision, the appellant was 25 years old, a student and was living with his parents in his brother-in-law's home. He was supported financially by his parents, from the pension his father received from the British Army. He suffers from a congenital heart defect, leaving him physically weak.

5. At the hearing before the judge, the appellant's Counsel, Mr Collins, relied upon Article 8 ECHR outside the Immigration Rules as to the appellant's right to a family and private life, and secondly the discretion provided for in the Secretary of State's published policy in relation to the dependants of Foreign and Commonwealth HM Forces Members, which included Gurkhas, and the issue relating to historical injustice. Mr Collins relied in particular upon **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567 (IAC)**.

6. It is argued in the grounds that the judge's Record of Proceedings would show that the evidence of the appellant's father was unchallenged. That evidence was to the effect that had he been allowed to apply for settlement in the UK upon his discharge from the army in 1984, he would have done so. However, he was never given the opportunity until recently.

7. Based on the unchallenged evidence of the appellant's father, I find that the judge erred in finding that there was insufficient cogent evidence for finding that the sponsor would have applied for settlement in the UK upon his army discharge in 1984 had he been allowed to do so. The judge's finding goes against the father's unchallenged evidence.

8. The respondent's policy, which came into force in January 2013 and which is in respect of applications for settlement by an adult child of a former Gurkha, appears to have come into force after the Court of Appeal's decision in **R (Gurung) v SSHD [2013] 1 WLR 2546**, which is the authority on historic injustice suffered by Gurkha and/or dependants; and the Tribunal's decision in **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) Nepal [2013] UKUT 567 (IAC)**.

9. I accept Ms Akinbola's submission that the findings made by the judge at paragraph 34 which led her to conclude that there was sufficient evidence to justify a grant of settlement status to the appellant under the discretionary criteria of the policy, should have led the judge to find that

the appellant's case engaged Article 8(1) and therefore the appeal should have been allowed under Article 8.

10. Indeed Mr Wilding submitted that if Article 8(1) is engaged then on the facts the appellant should succeed.

11. I find that those findings were sufficient to engage Article 8(1).

12. I find that the unchallenged evidence of the appellant's father to the effect that he would have settled in the United Kingdom in 1984 had he been given the opportunity to do so was, as noted in **Ghising**, material to the outcome of the applicability of the respondent's policy and to the proportionality exercise.

13. I find that had the judge applied her findings under the policy to the Article 8 appeal, she would have reached the conclusion that the appellant engaged Article 8(1) of the ECHR and that applying **Ghising** and **Gurung** his appeal should succeed.

Notice of Decision

I find that the judge's decision cannot stand for the material errors identified above.

I redetermine the appeal and allow the appellant's appeal.

Prior to signing this determination, a letter was received from Howe & Co dated 24 August 2015 information the Upper Tribunal that the appellant was granted indefinite leave to enter on 10 August 2015. The respondent should have been aware of this and saved the parties and the Upper Tribunal time and funds.

Signed Date

Upper Tribunal Judge Eshun