Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02627/2014
OA/02629/2014
OA/02633/2014

THE IMMIGRATION ACTS

Heard at Field House
On the 22nd May 2015

Decision & Reasons Promulgated
On 25th June 2015

Before:

UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR SANTOSH PUN
MR DIPAK PUN
MR DIPENDRA PUN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the appellants: Mr R. Jesurum (Counsel)
For the respondent: Mr T. Wilding (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appellants' appeal against the decision of First-Tier Tribunal Judge McIntosh dated the 28th November 2014.

Background

2. The appellants are citizens of Nepal. Mr Santosh Pun was born on the 13th July 1983. Mr Dipak Pun was born on the 5th September 1988. Mr Dipendra Pun was born on the 14th April 1991.

3. In November 2013 the appellants applied for entry clearance to settle in the United Kingdom as the dependant sons of Mr Amar Badahur Pun, an ex Gurkha soldier and Mrs Lal Kumari Pun. On the 20th January 2014 the respondent refused the appellants' application for entry clearance. The appellants appealed to the First-tier Tribunal (Immigration and Asylum Chamber) and that appeal was heard at Taylor House by First-Tier Tribunal Judge McIntosh on the 5th November 2014. It was conceded before First-Tier Tribunal Judge McIntosh that the appellants did not meet the requirements of the Immigration Rules, but he went on to consider their claim in accordance with Article 8 of the ECHR. Judge McIntosh at paragraph 34 of his decision relied upon the case of Ghising (family life-adults-Ghurkhas policy) v SSHD [2012] UKUT 00160 (AIC), and went on to find that the appellants lived together as a family unit, and had two sisters who continued to reside in Nepal with their respective families. He found that the appellants had lived separately from their sponsor, their father, for over 2 years and each was over the age of 18. He found that there was no prejudice to the family life enjoyed by the appellants and that they were able to continue family life in Nepal with some financial support from her father and brother. He found the decisions in the appellants' case did not breach their Human Rights under Article 8 of the ECHR, in respect of their family life.

4. The appellants appealed to the Upper Tribunal against that decision on the 17th January 2015.

5. In the grounds of appeal, it was argued that the First-Tier Tribunal Judge misdirected himself wrong in law by relying upon paragraphs 2 and 3 of the headnote of the case of Ghising (family life-adults-Ghurkhas policy) v SSHD [2012] UKUT 160 (IAC) ("Ghising [2012]") at paragraph 34 of the decision and that the correct law was now set out in the cases of R (Gurung) v The Secretary of State for the Home Department [2013] 1 WLR 2546 and Ghising and others (Ghurkhas/BOCs-historic wrong-weight) [2013] UKUT 567 (IAC) ("Ghising [2013]"). It is argued that the historic injustice Gurkha cases require consideration as to whether not family life exists between the sponsor and the adult children and that if it did, that would be a "strong reason" why settlement was proportionate and that the historic injustice will "normally require" a decision in the appellants' favour unless the respondent relies on something more than "the ordinary interests of immigration control". It is argued that there was no finding on the issue as to whether or not there was family life between the adult appellants and their father and mother, and that the First-Tier Tribunal Judge materially erred in law in applying the wrong law and failing to make findings on a crucial matter.

6. First-Tier Tribunal Judge Levin granted permission to appeal on the 4th March 2015, on the basis that there was an arguable failure by the First-Tier Tribunal Judge to make specific findings as to whether or not there were sufficient family life between the appellants and the sponsor so as to engage Article 8 on the basis of family life. Further, he found that it was arguable that the Judge's citation and reliance upon paragraphs 2 and 3 of the headnote of Ghising [2012] which had been overturned by the Court of Appeal in the case of R (on the application of Sharmila Gurung and others) v the Secretary of State for the Home Department [2013] EWCA Civ 8 amounted to an arguable error of law. It is on that basis the appeal comes before us.

Error of Law

7. As was properly conceded by Mr Wilding on behalf of the respondent, it is clear that at paragraph 34 of his decision, First-tier Tribunal Judge McIntosh did rely upon the wrong law when quoting paragraphs 2 and 3 of the headnote of the decision of the Upper Tribunal in the case of Ghising [2012] UKUT 00160 (AIC), despite those two paragraphs of the headnote having been overturned by the Court of Appeal in the case of R (on the application of Sharmila Gurung and others) v The Secretary of State for the Home Department [2013] 1 WLR 2546, in which the reasoning in Ghising [2012] that the impact of the historic wrong on the balancing exercise performed under Article 8 (2) was "limited" and as such carried "substantially less weight" than the impact of the historic wrong suffered by British Overseas Citizens, and that in most cases the public interest in having a firm and consistent immigration policy would outweigh the historic injustice suffered by the Ghurkhas, was found to be wrong.

8. The Court of Appeal in Gurung at paragraph 50 stated that "We do not consider that a judgement about the egregiousness of the injustice that was suffered by the Gurkhas as compared with that suffered by the BOCs should be a relevant factor in the balancing exercise. As submitted on behalf NR, Ghising and KR, the crucial point is that there was an historic injustice in both cases, the consequence of which was that members of both groups were prevented from settling in the UK. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependant child of a Gurkha settled in the UK has such a strong claim to have his article 8 (1) right vindicated, notwithstanding the potency of the countervailing public interest in the maintaining of a firm immigration policy. There is no place in the balancing exercise for making fine judgements

as to whether one injustice is more worthy of condemnation than another. Such judgements, (which would in any event be difficult to weigh) may be relevant in the political plane. They are not relevant to the making of decisions as to whether it is proportionate to interfere with an individual's Article 8 (1) rights.".

9. The Upper Tribunal in the case of Ghising and others (Ghurkhas/BOCs:- historic wrong; weight) [2013] UKUT 00567 (AIC) found that in the case of Ghurkhas, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight and that where it is found that Article 8 is engaged, and, but for the historic wrong, the appellant would have been settled in the United Kingdom long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the 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. It was further found that if the respondent can point to matters over and above the public interest in maintaining a firm immigration policy, which are in favour of removal or refusal of leave to enter, these matters must be given appropriate weight and balance in the respondent's favour and that therefore a bad immigration history and/or criminal record may still be sufficient to outweigh the powerful factors bearing on the appellant's side of the balance.

10. Although Mr Wilding accepted that the First-tier Tribunal Judge had misdirected himself in law as identified above, he nevertheless submitted that such error was not material because it related to the issue of proportionality and the First-tier Tribunal had correctly concluded that the appellants do not share a family life with their UK-based parents. In support of this submission

the Tribunal's attention was drawn to paragraphs 35 and 38 of the decision. It was particularly argued that it could be implied from the Judge's reasoning in paragraph 36 of the determination that he had concluded that the appellants had not, respectively, established that they are engaged in a family life with their parents.

11. However, upon being pressed by the Tribunal Mr Wilding accepted that even if the finding on family life could be implied into paragraph 36, and for the sake of completeness we have no hesitation in concluding that it cannot, the Judge failed to provide adequate reasons for such conclusion. He further properly conceded that if family life was found to exist between the appellants and their parents, then their appeals ought to be allowed given (i) the terms of the decision in Ghising [2013] and (ii) the positive credibility finding made by the Judge at paragraph 39 of the decision.

12. Given the proper concessions made on behalf of the respondent we conclude that the First-tier Tribunal's determination contains an error of law capable of affecting the outcome of the appeal and we, accordingly, set such determination aside.

Re-making of the decision on the appeal

13. The only matter left in dispute before us is whether any, and each, of the appellants can establish that, as of the date of the Entry Clearance Officer's decision, they shared a family life with their UK-based parents. If this can be established, and Article 8 is engaged, then following the rationale of the decisions in Gurung and Ghising [2013], as recognised by the concession of Mr Wilding, the interference with the appellants' family lives, by refusing them entry clearance, would be disproportionate.

14. Mr Jesurum observed that in respect of the issue as to whether family life existed between the appellants and their parents, the Judge found both the appellants and their witnesses credible at paragraph 39 of the decision. He referred us to his skeleton argument that was before the First-tier Tribunal Judge. He argued that what constitutes an extant family life falls well short of dependency following the Court of Appeal case of Patel and others v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17 and that simply because the appellants had obtained the age of majority did not end family life between them and their parents. He argued that the appellants are still living in the family home and had not established independent families of their own. He argued that the appellants were residing with their father and mother until the long delayed grant of settlement to their father and the whole family demonstrated a continuing intention to maintain family unity, frustrated only by the delayed grant of settlement. He argued that the appellants are financially dependent upon the sponsor and are also dependent upon the father's support for providing accommodation. Mr Jesurum argued that the parents were close to the appellants and that they speak to each every other day by telephone.

15. Mr Jesurum therefore argued that following the case of Kugathas v Secretary of State for the Home Department [2013] EWCA Civ 31, that the relationship between the appellants and their parents was more than the normal emotional ties existing between adult children and their parents, such that Article 8 was engaged. Mr Jesurum argued that if the only weight on the public interest side of the balance was the interest of immigration control, then the weight to be given to the historic injustice will normally require a decision in the appellants' favour, following the Upper Tribunal's decision in the case of Ghising others (Ghurkhas/BOCs-historic wrong-weight) [2013] UKUT 567. He asked us to allow the appeal.

16. Turning to our consideration of the issue of family life. We remind ourselves that Judge McIntosh found the appellants and their witnesses to be consistent and credible in their evidence. The evidence from their father, Mr Amar Badahur Pun in his statement dated 23rd October 2013 at paragraph 6, states specifically that if he had been allowed to settle in the United Kingdom in 1983, he would have done so and his sons would have been born in the United Kingdom and would have been British citizens, or have been naturalised soon thereafter. He also went on to state at paragraph 7 of his statement that his sons are completely dependent upon himself and his wife. He explained how he sends money of between £100 and £200 to his sons every 2 to 3 months, as they have no other form of income.

17. Further, the appellants themselves in their joint statement, state at paragraph 7 that their parents are a central part of their family and that they remain heavily financially and emotionally dependent upon them and that their parents have always been there to support them. The appellants say they are a close family unit and they did not intend to be separated for so long. At paragraph 10 they confirm that their parents send them money regularly. At paragraph 9 they state that they are in regular contact via telephone and at paragraph 10 they say that they receive support from the parents to cover their education fees, living expenses and accommodation costs.

18. In his statement dated the 22 October 2014, Mr Amar Pun at paragraph 5 also confirmed that all the sons are not married and are financially dependent upon him and his wife. He explained that Santosh and Dipendra will continue their studies and that Dipak is not able to find work. He stated that they still live in the family home in the village, or in a rented room in Kathmandu when Santosh and Dipendra are studying and that he continues

to send money transfers to his sons to cover their education fees and living expenses.

19. Mrs Lal Pun, the appellants' mother, in her statement dated the 29th October 2014, again confirms the financial, practical and emotional support given to her three sons and how she and husband are in contact every other day with them using Lebara mobiles. She states that is a constant struggle for them all to be separated in this way, whilst they await the appellants' applications to be granted.

20. All of the evidence of the appellants and their witnesses was accepted as credible by First-tier Tribunal McIntosh, whose credibility findings we have preserved. On the basis of the accepted evidence before us we conclude that the nature of the relationship between the appellants and their parents as described above amounts to a family life for the purposes of Article 8 ECHR.

21. In coming to the aforementioned conclusion, we have borne in mind and applied the law as it is set out in paragraphs 48 to 62 of the Upper Tribunal's decision in Ghising [2012], which was not disturbed by the Court of Appeal in its decision in Gurung.

22. We note that as was stated by Lord Justice Sedley in the case of Kugathas v the Secretary of State for the Home Department [2003] EWCA Civ 31, that in order for there to be family life between adult children and their

parents, and that dependency is not limited to economic dependency, but means "support" in the personal sense, in the form of "real", "committed" or "effective" support.

23. It is significant in this case that the appellants have not established an independent family life, but are all still single and still all live together in the family home or in accommodation rented by their father in Kathmandu when Santosh and Dipendra are studying. We further bear in mind that they all lived with their parents until they were separated after the grant of leave to their parents. We also accept and find as a fact that all three appellants are financially dependent upon their parents for both their maintenance and living accommodation. We also accept and find the fact that the appellants are in a close-knit family relationship with their parents and that they do speak together on telephone every other day. We do accept that the appellants depend upon their parents for support and affection and that their parents provide therefore not only financial support, but also practical and emotional support, as stated by Mrs Pun.

24. We find that although there had been an interruption to their family life by the appellants not being granted leave to enter the United Kingdom, they do remain financially and emotionally dependent upon their parents and that the ties between them do therefore go beyond the normal emotional ties between adult children and their parents and we accept that normal family life will be resumed between the appellants and their parents if the appellants are able to come to the United Kingdom to settle. In such circumstances we consider that Article 8 is engaged-the consequences of the interference with the appellants' family lives by the ECO's decision being of sufficient severity to lead us to such conclusion.

25. Turning to the issue of proportionality, it has not been argued by Mr Wilding, quite properly, that there are any factors in this case which count in the respondent's favour, or weigh against the appellants, other than the weight to be attributed to the maintenance of an effective immigration control, and in such circumstances, we find, in light of the decision of the Upper Tribunal in Ghising and Others (Ghurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567, that the historic injustice in this case does determine the outcome of the Article 8 proportionality assessment in the appellants' favour, given that the only matter relied upon the by the respondent consists of the public interest in maintaining a firm immigration policy and that, had he been allowed to do so, the appellants' father, Mr Amar Pun would have settled in the UK long ago and that the appellants would either have been born as British citizens or would have been naturalised long ago.

26. We have borne in mind in considering the proportionality balancing exercise under Article 8 the provisions of sections 117 A-D of the Nationality, Immigration and Asylum Act 2002, and have borne in mind that the maintenance of an effective immigration control is in the public interest and that it is in the public interest and in particular in the interests of the economic well-being of the United Kingdom that persons who seek to enter or remain in the United Kingdom are able to speak English and are financially independent, because persons who can speak English are less of a burden on taxpayers and are better able to integrate into society and those who are financially independent are not a burden on taxpayers and are better able to integrate into society. We have also borne in mind in this regard that the appellants themselves are able to speak English, but that they are dependent financially upon their parents.

27. However, we regard section 117A-D as setting out matters that have to be borne in mind by the Tribunal when considering the public interest element in the proportionality exercise, and that the introduction of this section does not amount to a redressing of the balance in historic Gurkha injustice cases from that set out within Ghising and Others (Ghurkhas/BOCs: historic wrong: weight) [2013] UKUT 00567. It was, quite properly, not argued by Mr Wilding, that section 117A-D, could have any effect on the outcome of this case.

28. The appellants' appeals are therefore allowed on Human Rights grounds in respect of their family life under Article 8.

Notice of Decision

The decision of the First-tier Tribunal Judge contained material errors of law and is set aside. The decision is remade allowing each of the appellants' appeals on the basis that the ECO's decision led to a breach of Article 8 of the ECHR.

The First-Tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, and no application for an anonymity order was made before us. .

Signed Dated 25th May 2015

Rob McGinty

Deputy Upper Tribunal Judge McGinty

TO THE RESPONDENT

FEE AWARD

The appellants having succeeded in their appeal, any fees paid by them should be refunded to them in full.

Signed Dated 25th May 2015

Rob McGinty

Deputy Upper Tribunal Judge McGinty