
**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: OA/03123/2014**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision Promulgated** |
|---|---|
| **On** 9 October 2015 | **On 19 October 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**LAXMAN GUPUNG**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr M Puar (counsel) instructed by N C Brothers & Co, solicitors
For the Respondent: Ms E Savage, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Phull promulgated on 5th May 2015, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 5 May 1987 and is a national of Nepal.

4. On 12 February 2014 the Secretary of State refused the Appellant's application for entry clearance as an adult dependent relative of a person present & settled in the UK.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Phull ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 31st July 2015 Judge Simpson gave permission to appeal stating *inter alia*

> "... having found in [35] and [36] that A "..... Is emotionally and financially dependent on his mother for his needs.... I am satisfied that they enjoy a relationship which goes beyond normal emotional ties and therefore Article 8 is engaged" it is arguable that she ought to have followed the guidelines in Ghising & Ors, particularly as the ECO refused entry clearance solely on public interest grounds."

The Hearing

7. Mr Puar, for the appellant adopted the terms of the grounds of appeal. He told me that there is no great dispute about the facts in this case, but that the Judge had carried out an inadequate balancing exercise when assessing the question of proportionality. He told me that the Judge finds that family life exists and at [15] correctly identifies the burden of proof, but incorrectly sites Ghising (family life – adults- Ghurka policy) [2012] UKUT 00160 (IAC). At [39] (he told me that) the Judge reverses the burden of proof, and so makes a material error of law. He told me that the Judge has applied the wrong test, and had the Judge applied the test set out in Ghising & Others (Ghurkas/BOCs: historic wrong; weight) [2013] UKUT 00567(IAC), the appellant's appeal would have met with success. He urged me to allow the appeal, set aside the decision and substitute a decision allowing the appellant's appeal against the respondent's decision.

8. Ms Savage for the respondent simply told me that the respondent accepts that the Judge did not follow the guidance given in the case of Ghising & Others (Ghurkas/BOCs: historic wrong; weight) [2013] UKUT 00567(IAC), and told me that she could see force in the arguments advanced for the appellant

Analysis

9. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) it was held that (i) 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; (ii) 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); (iii) 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; (iv) 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 SSHD/ ECO consist solely of the public interest in maintaining a firm immigration policy; (v) It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (a) their family life engages Article 8(1); and (b) 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.

10. It is common ground that the Judge's findings can stand in this case. The difficulty that the judge ran into was a clear misdirection of law. At [15] the Judge takes guidance from the case of Ghising (family life – adults- Ghurka policy) [2012] UKUT 00160 (IAC). She was wrong to do so. Guidance in a case of this nature comes from Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC). In referring to Ghising (family life – adults- Ghurka policy) [2012] UKUT 00160 (IAC) the Judge manifestly applied the wrong test.

11. At [34] & [35] the Judge finds that family life exists within the meaning of Article 8 ECHR. At [37] the Judge narrates "*There will be interference by the decision to exclude and it is in accordance with the law. The question for me is whether in all the circumstances it is proportionate.*" In the second sentence of [39] the Judge says "*The appellant does not provide evidence why his exclusion is disproportionate and how his circumstances are exceptional".*

12. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) it was held that 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

13. In the second sentence of [39] the Judge clearly reverses the burden of proof. I therefore find that the decision contains material errors in law and

requires to be remade, however I find that there is no error the Judge's findings of fact, and so they are preserved.

14. At [31] the Judge finds that the appellant cannot fulfil the requirements of the immigration rules. That is not something which is in dispute. The Judge correctly directed himself in relation to the five step test set out in Razgar [2004] UKHL 27, and considers section 117A & 117B of the 2002 Act. The determinative question in this case is whether or not, on the facts as the Judge found them to be, the respondent's decision is a disproportionate interference with the appellant's right to respect for family life.

15. The appellant's mother is a British citizen, who settled in the UK in 2006. Although the appellant is now an adult, the Judge found that family life exists between the appellant and his British citizen mother. The appellant's late father was a member of the Gurkha Brigade. The appellant is a student. He suffers from depression and has passive suicidal thoughts. He lives alone and is withdrawn and isolated. The appellant's father served in the British Army for 25 years until he was discharged in 1973. He died in 2005, but if he had been given the opportunity he would have settled in the UK.

16. The Judge's findings in fact indicate that there has been an historic wrong suffered by the appellant's late father would have settled in the UK if he had the opportunity to do so. That is a factor which weighs in the appellant's favour. The effect of the respondent's decision would be to enforce continued separation of the appellant and his mother. Although the appellant is an adult, he is a vulnerable young man who is in daily contact with his mother. The Judge found at [36] that the relationship between the appellant and his mother goes beyond normal emotional ties.

17. I turn to section 117B of the 2002 act. This case concerns Article 8 family life, so that subsections (4) (5) & (6) are irrelevant. The documentary evidence indicates that the appellant speaks English, and that his mother has supported him. She is in a financially comfortable position and continues her support. There are therefore more factors in section 117B which were in the appellant's favour than count against the appellant. In addition the appellant's father was deprived of the opportunity to settle in UK. Had he done so it is likely that a significant part of the appellant's child been spent in the UK.

18. The respondent's position is simply that entry clearance is refused solely on public interest grounds. Section 117B(1) of the 2002 act tells me that effective immigration control is in the public interest.

19. When I weigh those factors against one another and apply the guidelines in the case of Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) I come to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for family life within the meaning of Article 8 ECHR.

**Decision**

**20. The decision of the First-tier tribunal is tainted by a material error of law.**

**21. I set aside the decision & substitute the following decision.**

**22. I dismiss the appeal under the Immigration Rules.**

**23. The appeal is allowed on Article 8 ECHR grounds.**

Signed Date 15 October 2015

Deputy Upper Tribunal Judge Doyle