**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: OA/15257/2013**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On May 6, 2015** | **On May 8, 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MISS ISHA DEWAN**
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellant: Mr Akhtar (Legal Representative)
For the Respondent: Mr Walker (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The Appellant is a citizen of Nepal. The appellant applied for entry clearance on April 23, 2013 but this application was refused by the respondent on June 21, 2013.

2. The appellant appealed this decision on November 7, 2013 under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and the respondent reviewed the decision and appeal on January 22, 2014 but upheld the refusal.

3. The appeal came before Judge of the First-tier Tribunal Khan (hereinafter referred to as the "FtTJ") on August 13, 2014, and in a decision promulgated on September 3, 2014 he refused the appeal.

4. The appellant lodged grounds of appeal on September 5, 2014 submitting the FtTJ had erred by materially in law in his approach to Article 8 ECHR but Judge of the First-tier Tribunal Hollingworth refused permission to appeal. Grounds of appeal were renewed to the Upper Tribunal on November 15, 2014. Upper Tribunal Judge Reeds found there was an arguable error in law because the FtTJ had not had regard to what the Upper tribunal had said in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC).

5. The matter came before me on the above date and the parties were represented as set out above. The sponsor, Sagun Dewan, and his wife were both in attendance.

6. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I see no reason to alter that order.

## PRELIMINARY ISSUE

7. I raised with Mr Walker whether he agreed with the contents of the rule 15 letter dated April 1, 2015 and he indicated that he did not adopt that letter. He accepted that the FtTJ had materially erred because in paragraph [17] he stated the "need for a fair and effective immigration control outweighs any Article 8 claim that might exist". He indicated that the respondent accepted family life existed at the date of application because the family had all been living together in Nepal save when she attended university when she was supported by the sponsor in any event. He was conscious of the fact the FtTJ failed to have regard to Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) in his determination in which the Tribunal stated at paragraph [60]-

> "… 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."

He invited me to set aside the earlier decision under Article 8 ECHR.

8. Mr Akhtar had no submissions to make on that issue and invited me to set aside the decision and to remake it.

## FINDINGS

9. When this matter came before the FtTJ I am satisfied he did not have regard to all of the relevant case law and in particular he did not have regard to Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) although he did have other cases before him including Gurung & Ors, R (on the application of) v The Secretary of State

for the Home Department [2013]EWCA Civ 8 and Ghising (Family Life - adults - Gurkha policy) [2012] UKUT 00160 (IAC).

10. The Tribunal in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) considered what the Court meant in Gurung with regard to the issue of historic injustice and proportionality. They found at paragraphs [59] and [60]-

> "59. That said, we accept Mr Jacobs' submission 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 an Appellant's favour. The explanation for this is to be found, not in any concept of new or additional "burdens" but, rather, in the *weight* to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. What was crucial, the Court said, was the consequence of the historic injustice, which was that Gurkhas and BOCs:
>
> > "were prevented from settling in the U.K. That is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Gurkha who is 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 maintaining of a firm immigration policy". [41]
>
> In other words, the historic injustice issue will carry significant weight, on the Appellant's side of the balance, and is likely to outweigh the matters relied on by the Respondent, where these consist solely of the public interest just described.
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> 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."

11. The FtTJ did not make any specific findings on whether Article 8 was engaged and in light of his finding at paragraph [17] when he stated "the

need for a fair and effective immigration control outweighs any Article 8 claim that might exist" I am satisfied he failed to engage with the guidance from the Upper Tribunal in such cases. He was required to make findings on why the appeal was refused and if it was only because of historic injustice then he should have found that would outweigh any immigration control issues.

12. I agreed to set aside the FtTJ's decision in so far as Article 8 ECHR was concerned. The decision under the Immigration Rules was unchallenged.

13. Mr Walker accepted there was family life both in 2011 and in 2013 when the appellant's family came to the United Kingdom. There were no adverse factors against allowing the application under Article 8 ECHR other than immigration control. Although he was aware of the immigration history he did not intend to argue that the appeal was being refused for anything else than immigration control and he accepted that there was an historic injustice in this appeal because the appellant's father had been prevented from applying when she was under the age of 18 to bring her with him.

14. Mr Akhtar confirmed that the appellant had been unable to pursue an application in 2011 because of a problem with her birth certificate and at the time she was studying. He confirmed the appellant and her family lived together until the sponsor, her mother and siblings all came to the United Kingdom in April 2013. Shortly afterwards she applied for entry clearance. He accepted the Immigration Rules were not met but submitted that the only reason now advanced by the respondent for refusing the application under Article 8 was for immigration control reasons and in light of the decision in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) he submitted that the appeal should be allowed.

## FINDINGS OF FACT

15. The appellant is now twenty three years of age but she submitted this application when she was twenty two years of age. She had been living with her family in Nepal until they came to the United Kingdom on April 2, 2013. Mr Walker has accepted there is family life and that Article 8 would be engaged despite the Immigration Rules not being satisfied (accommodation and maintenance issues).

16. I challenged Mr Walker as to the respondent's position and posed two questions namely:

    a. Was this case refused for any reason other than immigration control because the Immigration Rules were not met?

    b. Did he accept the appellant would be covered by the "historic injustice" issue highlighted in cases such as Gurung and Ghising.

17. Mr Walker indicated there were no adverse factors that could be held against the appellant and her father's position was covered by the phrase

"historic injustice". He indicated he did not oppose the appellant being granted entry under Article 8 ECHR.

18. In light of Mr Walker's position and having regard to case law I therefore allowed the appeal under Article 8 ECHR.

**DECISION**

19. There was a material error but only in so far as Article 8 is concerned. I have set aside that part of the FtTJ's decision and I have remade the decision and allowed it under Article 8 ECHR.

Signed: Dated: **May 6, 2015**

Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT**
**FEE AWARD**

The substantive appeal under the Immigration Rules failed and I therefore make no fee award.

Signed: Dated: **May 6, 2015**

Deputy Upper Tribunal Judge Alis