IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/17823/2013
OA/17825/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 September 2015	**On 21 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

DHAK BAHADUR PITHAKOTE
DEEPAK BAHADUR THAPA
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER,
NEW DELHI

Respondent

Representation:
For the Appellants: Mr R Jesurum of Counsel instructed by Howe & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. These are linked appeals against the decisions of First-tier Tribunal Judge Prior promulgated on 5 August 2014 dismissing the appeals of the Appellants, Mr Dhak Bahadur Pithakote and Mr Deepak Bahadur Thapa against decisions of the Respondent, the Entry Clearance Officer at New Delhi dated 28 August 2013 refusing entry clearance.

2. The Appellants are brothers. They are nationals of Nepal and the sons of Mr Surja Bahadur Thapa and Miss Maina Kumari Pithakote Maga. The Appellants' father enlisted in the British Army's Brigade of Gurkhas in January 1980 and served in that brigade until his discharge on 14 January 1995. In 2006 the Appellants' father made an application for settlement in the UK which was refused. Following a change in the policy of the UK Government a further application was allowed in July 2009. Unfortunately the Appellants' father died before he could take up the entry clearance that he had belatedly secured. The Appellants' mother however was granted settlement and travelled to the United Kingdom.

3. The Appellants then made applications in July 2013 for entry clearance to join their mother in the UK with a view to settlement. Those applications were refused for reasons set out in respective Notices of Immigration Decision dated 28 August 2013. Essentially it was the Respondent's evaluation that the Appellants did not satisfy the requirements of the Immigration Rules, that there was no applicable policy outside the Immigration Rules, and that the Appellants could not benefit pursuant to Article 8 of the European Convention of Human Rights.

4. In respect of Article 8 issue was taken by the Respondent in respect of the existence of family life as between the Appellant and their mother, and also in the alternative in respect of the issue of proportionality. In this latter regard the Notice of Immigration Decision in respect of each of the Appellants contains the same wording:

> "However if I am wrong on that, [i.e. in respect of Article 8(1)] I consider that refusing this application is proportionate in the exercise of firm immigration control. Your mother chose to apply for a settlement visa when you were already an adult. You have an adult sibling who is settled in Nepal. I also consider that refusing this application is justified and proportionate in the exercise of the immigration control given that the requirements of the Immigration Rules are not met and they are intended to maintain an effective immigration control and guard the public purse in order to protect the rights and freedoms of others and the economic wellbeing of the country."

5. The Appellants appealed to the IAC and their cases were dismissed by Judge Prior for reasons set out in his 'Determination and Reasons'.

6. Before the First-tier Tribunal it was acknowledged on their behalves that the Appellants could not satisfy the requirements of Appendix FM, the requirements of paragraph 317, or otherwise any of the Immigration Rules. It was also acknowledged that there was no published policy directly applicable to the Appellants' circumstances. Accordingly the Appellants advanced their cases before the Tribunal on the basis of human rights grounds, with reference specifically to Article 8 of the ECHR.

7. The First-tier Tribunal Judge directed himself in respect of Article 8 at paragraph 4 of his decision, and although he made no express reference by name to the case of **Razgar** he set out the familiar five **Razgar**

questions at paragraph 4. Thereafter the determination sets out the respective cases being advanced by the Appellants and the Respondent before reaching a section headed 'Decision and Reasons'.

8. Paragraph 17 is in the following terms:

> "There were no statements from the Appellants and their evidence in interview did not touch upon the strength or otherwise of their emotional ties to the second[1] sponsor. The authorities make it clear that financial ties between adults are not sufficient alone to establish family life between them. I do not accept even on the low standard applicable, that the refusal of the Appellants' applications constitute a grave interference from their perspective of their family lives with the second Sponsor. From the second sponsor's perspective I do accept that it would be a grave interference however I would bear in mind, in that context, that the second sponsor whose extended family is very largely in Nepal, could reasonably be expected to return to Nepal where she has a property having only been in the United Kingdom for 3 years and 2 months. The second sponsor is aged 52 and has spent the greater part of her life in Nepal."

9. As regards the position of the 'second sponsor' - the Appellants' mother - in my judgment the Judge's references to the possibility of her returning to Nepal disregard what would be an appropriate approach to the proportionality of her Article 8 private life established in the UK, and in particular disregard the fact that her settlement in the UK is founded on her relationship to a member of the Brigade of Gurkhas. The Judge's notion of the 'reasonableness' of her now quitting the UK disregards the elements of historical justice that made it entirely appropriate for her to seek to establish a life in the United Kingdom irrespective of any elements of her private life that may exist abroad, and runs contrary to the established case law on proportionality and those matters that informed the changes in policy by which she was able to secure entry clearance.

10. Another troubling aspect of paragraph 17 is the seeming tension between the first part of it, in which the Judge finds that there is not a grave interference in family life as between the Appellants and their mother, and the second part, where the Judge finds that there is a grave interference with family life as between the mother and her children. It may be possible to envisage some circumstances where a family life can exist for one individual with another and yet not be mutual. Mr Jesurum suggested an example of a person in a coma. Theoretically that might be so, but on the face of it that is not the case here. I struggle with the First-tier Tribunal Judge's approach at paragraph 17 which seems to deny the mutuality of family life.

11. Be that as it may I am persuaded that the finding that family life exists, and that there would be a grave interference with it in respect of the Appellants' mother, are findings that stand unchallenged before me, and I accept that this establishes a proper foundation from which a

[1] The Judge used the phrase 'second sponsor' in respect of the Appellants' mother to distinguish her from the 'first sponsor', that is the Appellants' deceased father.

consideration of proportionality must follow. The Judge's conclusion that there would be a grave interference echoes the first two of the **Razgar** questions to which he directed himself at paragraph 4. And indeed, thereafter, at paragraph 18, the Judge goes on to consider the issue of proportionality. It would not have been necessary for him so to do if he had formed the view that family life did not exist and that therefore Article 8 was not engaged.

12. Appropriate guidance in respect of the approach to be taken to Article 8(2) in the context of a case involving family members of a veteran of the Brigade of Gurkhas is to be found in the case of **Ghising & Others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)**. The case of **Ghising** was cited before the First-tier Tribunal Judge (see for example at paragraphs 10 and 11; the Judge also referred to **Ghising** in his concluding paragraph in respect of proportionality at paragraph 18 of his decision). I do not propose to rehearse the background in the case of **Ghising** but I consider it instructive to set out the following paragraphs from the head note:

> "(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.
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> (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."

13. I remind myself that the Respondent's decisions in these cases in respect of proportionality relied entirely upon the maintenance of firm immigration control. On the face of it, the case of **Ghising**, if applicable, would appear to secure the Appellants a favourable outcome in their appeals.

14. The First-tier Tribunal Judge however does not follow the case of **Ghising**. He declines so to do on the basis that the Appellants' father did not intend to settle in the United Kingdom in 1995 at the point of his discharge from the Brigade of Gurkhas. In my judgment that approach was in error. Indeed, subject to a submission that I will return to in due course, Mr Jarvis acknowledges that the approach of the First-tier Tribunal Judge to the issue of proportionality was indeed in error.

15. The reason for the error is that insofar as the Second Appellant is concerned it is to be noted that he was still a minor when his father made an application for entry clearance in 2006. That application was dismissed because the law at that time did not allow for entry to the United Kingdom for a person in the position of the Appellants' father, a matter that was subsequently reversed following reconsideration of this country's policy towards former servicemen of the Gurkha Brigade. Necessarily, had it not been for that matter - which has been characterised as an historic injustice - the Second Appellant's father would have entered the United Kingdom at a time that the Second Appellant was a minor, it is reasonable to infer that he would have wished to be accompanied by his wife and minor child, and in those circumstances I am satisfied that the proportionality balance favours the Second Appellant.

16. The position of the First Appellant is slightly different because he is older. It is necessary to consider what the position might have been for him as between his father's discharge in January 1995 and his reaching his majority in January 2005.

17. There was before the First-tier Tribunal Judge written and oral evidence both from the Appellants' mother and also from a relative and family friend, Mr Shree Man Ale Magar. Both witnesses indicate in their respective witness statements that the Appellants' father had contemplated living in the United Kingdom, for example the Appellants' mother states at paragraph 16 of her witness statement: "*I believe that my late husband would have applied for settlement upon his discharge if there were such provision*", and Mr Magar states in his witness statement at paragraph 11, "*I knew him professionally as well as a relative. I have no doubt he would have settled in the UK had he had the chance to do so*". The First-tier Tribunal Judge makes no findings in respect of those matters and in those circumstances I am satisfied that his decision was in error and requires to be re-made.

18. In considering re-making the decisions I have come to the view that in circumstances where the First-tier Tribunal Judge identified nothing adverse in respect of the credibility of either witness, and otherwise in the absence of any factor to suggest a lack of credibility, it should be accepted that they express genuine sentiments as to the Appellants' father's intentions, or likely intentions had he had an earlier opportunity to avail himself of entry to the United Kingdom. In this context I recognise that the concept of 'intention' is somewhat nebulous if possible action is contingent upon factors outside the control of the actor: if it were the case, as it was,

that a person who had served with the Gurkhas was not permitted to enter the United Kingdom pursuant to entry clearance for the purposes of settlement, then it may well be that he did not form any serious intention or ambition to settle in the UK, but dismissed it from his mind as not viable. The conduct of such a person in establishing himself in his home country (or indeed in another country) given that he could not enter the UK, cannot be taken as in some way evidence of a lack of aspiration, wish or intention to enter the UK had that been an opportunity open to him. Given those circumstances, in my judgment it should be concluded that the Appellant's father would more likely than not have sought to settle in the UK at some point prior to the majority of each of his children. In turn, in those circumstances the guidance in **Ghising** is of application and I conclude that the proportionality balance favours both Appellants and their appeals should be allowed accordingly.

19. In doing so I bear in mind the requirement to take into account the public interest considerations pursuant to section 117B of the Nationality, Immigration and Asylum Act 2002, and I do so. However it seems to me that the very particular nature of these type of cases - which have been the subject of lengthy and detailed consideration in the UK courts - is such that in the absence of any compelling adverse feature the element of historic injustice out-weighs the public policy considerations set out under section 117B.

20. I indicated above that there was one aspect upon which Mr Jarvis sought to make submissions - as it were as a 'knockout' blow to the Appellants' challenge - and that was in respect of the conclusion specified at the commencement of paragraph 17 that there was not a grave interference with the Appellants' family life with their mother. Mr Jarvis argued that this was adversely determinative of their cases under Article 8 and any – accepted – error in respect of proportionality was not material.

21. I acknowledge that if Article 8(1) was not engaged in this case the issue of proportionality would not be a live issue. Notwithstanding the tension between the first and second part of paragraph 17 for the reasons already given I am satisfied that there is a valid finding in respect of family life as regards the mother; in turn, by reference to the case of **Beoku-Betts**, that means that the proportionality issue must be considered.

22. Mr Jarvis very fairly indicated that if he was unable to succeed on that particular point, then he would acknowledge the error of law. He did not go so far as to concede that the outcome of this appeal should thereafter inevitably be one favourable to the Appellants, and invited consideration that it might be necessary to consider further evidence. However, in circumstances where no such further evidence is required in respect of the Second Appellant (by reason of the agreed fact of his father's application of 2006), and in circumstances where there is no basis for challenging the credibility of the mother or the witness, it is not necessary to reconvene this hearing to hear further evidence. I am satisfied that it is appropriate to conclude on the available evidence that it is more likely than not that

both Appellants would have been settled in the UK long ago but for the historic wrong.

23. In those circumstances the Respondent's decisions to refuse the Appellants entry clearance was in breach of their mother's human rights. In such circumstances entry clearance should properly have been granted and should now be granted.

24. In terms of the period of any grant of leave, it seems to me that it may be appropriate for the Entry Clearance Officer to consider that a period of leave in-line with their mother would be appropriate, bearing in mind this was an application for settlement and but for the historic injustice they are individuals who would likely have secured settlement in the UK by now. However, that is not ultimately a matter for me.

Notice of Decision

25. The decisions of the First-tier Tribunal contained material errors of law and are set aside. I re-make the decisions in the appeals.

26. Appeal OA/17823/2013 is allowed on human rights grounds.

27. Appeal OA/17825/2013 is allowed on human rights grounds.

28. No anonymity directions are made.

The above represents a corrected transcript of an ex tempore decision given following the conclusion of the hearing on 15 September 2015.

Signed Date: 18 September 2015

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and make a fee award of any fee which has been paid or may be payable.

Signed Date: 18 September 2015

Deputy Upper Tribunal Judge I A Lewis