



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/03655/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 6 June 2018

Decision & Reasons Promulgated  
On 20 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MR SUREN RAI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Jesurum, Counsel, instructed by Everest Law Solicitors  
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Nepal born on 6 June 1986. The appellant is now 32 years of age. The appellant submitted an application on 3 July 2015 for entry clearance to settle with his father, Mr Premjit Rai, an ex-Gurkha soldier. The respondent refused that application on 14 July 2015. In a Decision and Reasons promulgated on 19 April 2017, Judge of the First-tier Tribunal Kainth dismissed the appellant's human rights ground appeal.
2. The appellant appeals with permission that it was at least arguable that the weight to be placed on the maintenance of immigration control under Section 117B should reflect

the historic injustice issue and that the judge failed to properly apply the principles in **Ghising & Ors (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 567 (IAC)**.

3. The respondent in the Rule 24 response, dated 4 May 2018, indicated that the respondent did not oppose the appellant's application and invited the Tribunal to determine the appeal with a fresh oral hearing and to consider whether the appellant's Article 8 ECHR claim should succeed.
4. Ms Isherwood submitted that the refusal was not disproportionate. She submitted that the medical evidence only dated from 2011 and that if you reviewed the telephone calls, as she had, charging records showed that they were not in contact every day. She referred to various pieces of evidence including that the appellant had stated that he was scared whilst in the house but there was no reason given for this.
5. Those submissions in my view did not address, the fundamental issues in this case: given that Ms Isherwood accepted that both the respondent Entry Clearance Manager and the First-tier Tribunal Judge had accepted that there was family life in this case, the issue to be determined was the proportionality of the refusal. Ms Isherwood did not therefore adequately address the jurisprudence, including what was said in **Ghising** including that the weight to be given to the historic injustice 'will normally require a decision in the Appellant's favour'.
6. Ms Isherwood submitted that **Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320** should be narrowly interpreted in respect of Section 117 of the Nationality, Immigration and Asylum Act. That cannot be correct.
7. **Rai** provides as follows:
  - "55. With effect from 28 July 2014, Section 117A of the Nationality, Immigration and Asylum Act 2002, requires that where a court or Tribunal is considering the public interest, and whether an interference with Article 8 rights is justified, it must have regard, in cases not involving deportation, to the matters set out in Section 117B, including that the maintenance of effective immigration control is in the public interest (Section 117B(1)), that it is in the public interest that those seeking entry into the United Kingdom speak English (Section 117B(2)), and that it is in the public interest that those seeking entry be financially independent (Section 117B(3)).
  56. Mr Jesurum pointed out that the Upper Tribunal Judge did not consider the matters arising under those provisions of the 2002 Act. He submitted, however, that in view of the 'historic injustice' underlying the appellant's case, such considerations would have made no difference to the outcome, and certainly no difference adverse to him. Ms Patry submitted that if the Upper Tribunal's decision was otherwise lawfully made, the considerations arising under Section 117A and B could not have made a difference in his favour.
  57. The submissions made on either side seem right. Certainly, if the Upper Tribunal Judge's determination is in any event defective as a matter of law,

which in my view it is, I cannot see how the provisions in Section 117A and B of the 2002 Act can affect the outcome of this appeal.”

8. Lord Justice Lindblom was agreeing that whilst a lawful decision by the respondent could not be overturned with regard to any considerations under Sections 117A and B, equally the Court of Appeal accepted Mr Jesurum’s submission that in view of the “historic injustice” such considerations would have made no difference to the outcome.
9. Ms Isherwood was, in my view, attempting to reopen the family life finding in this appeal by the back door by suggesting family life was not particularly strong. Those submissions were, at best, questionable. For example, although she relied on the fact that the last medical evidence produced was from 2011, she did not dispute Mr Jesurum’s reply that such evidence indicated that the appellant had lost an eye and included photographs of the empty eye socket. It is difficult to see what additional medical evidence would be required in those circumstances.
10. I preserve the First-tier Immigration Judge’s finding of family life. I turn to the proportionality exercise, having answered the initial **Razgar** questions in the affirmative.
11. It is undisputed that the appellant’s father and sponsor served in the Brigade of Gurkhas for eleven years, including active service in the Falklands War, and was discharged in 1988. He was denied the option to settle in the UK at that time. The sponsor was eventually granted settlement in 2010, the appellant having turned 18 by then. It was the sponsor’s contention that had the injustice not happened the appellant would have accompanied the sponsor as a minor to the UK. It was accepted on behalf of the appellant, by Mr Jesurum, that the appellant could not meet the terms of the Annex K policy and that the appeal was only under Article 8.
12. It was accepted, in the refusal letter that the sponsor would have applied for settlement on discharge if he could have and the Entry Clearance Manager’s review considered that Article 8 was engaged. The only issue was proportionality. I agree with Mr Jesurum that as this is a historic injustice case, the weight to be given to the injustice would normally require a decision in the appellant’s favour unless the respondent relies on something more than the ordinary interest of immigration control.
13. I have reminded myself however that historic injustice is not the only issue to be considered and in reality there are many factors. Whilst **Patel v ECO (Mumbai) [2010] EWCA Civ 17** confirms that the interests of immigration control would in most outweigh Article 8 rights, in historic injustice cases the reverse is true and the approach in **Patel** is a compensatory one.
14. The Court of Appeal in **Rai [2017] EWCA Civ 320** confirmed that whilst the Tribunal must have regard to Section 117B including the maintenance of effective immigration control being in the public interest, it was also correct that given the historic injustice such considerations under Section 117B in themselves would not make an adverse difference to the outcome of such a case. In considering Section 117B, I accept that there was no independent evidence of the appellant’s command of English. I take into

consideration that if he had entered the UK in or shortly after 1988, as I accept he would have done but for the historic injustice, there would have been no difficulties with his command of English. Equally, in relation to financial independence I take into consideration that Annex K, although not relied on by this appellant, does not contain any maintenance and accommodation requirements (consistent with the Military Covenant). Although therefore, the appellant is not financially independent, this can be properly seen to be a consequence of the historic injustice, given that he would have entered the UK as a minor.

15. In considering whether the decision to refuse the appellant is a disproportionate interference with what it is not disputed is family life in this case, I have considered as set out in **Ghising & Ors [2013]** that a bad immigration history or criminal behaviour may tip the balance in the respondent's favour. However, if all that is relied on in the public interest is the interests of immigration control, "the weight to be given to the historic injustice will normally require a decision in the appellant's favour".
16. It was not disputed by Ms Isherwood that that there is no question of a bad immigration history or criminal behaviour in the appellant's case and I have considered in the appellant's favour, as highlighted by Mr Jesurum, the service of the sponsor including in the Falklands War and that he will have sacrificed elements of his family life in order to give such service to the British Army and that he served well in excess of the four years necessary to qualify for settlement.
17. Gurkhas suffered greater separation from their family than soldiers of other British Army units (see **R (Purja) v MOD [2004] 1 WLR 289**, including at [17]). I have also taken into consideration that the appellant has a degree of vulnerability in being blind in one eye. The appellant was also in a position when he grew up, for the first few years of his life without his father, due to the sponsor's service. The appellant and his family in the UK are in my findings, on the basis of all the evidence considered in the round, in constant contact. Although they enjoy family life, they have been unable to reunite in the UK. I accept the consistent reasons provided by the sponsor as to why the appellant did not apply earlier than he originally did in 2013 including due to the appellant struggling with his disability from losing one eye and primarily that the family's lack of adequate advice and limited finances were factors,
18. I have taken into consideration what was said in **R (Gurung) [2013] EWCA Civ 8** and I am satisfied that this is a case where the appellant has a strong claim to settlement.
19. Having weighed all these factors and applied the balance sheet approach (see **Hesham Ali [2016] UKSC 60**), I am satisfied that the respondent's decision represents a disproportionate interference with family life.

### **Notice of Decision**

The decision of the First-tier Tribunal contains an error of law and is set aside. I remake the decision allowing the appellant's appeal on human rights grounds.

No anonymity direction was sought or is made in this case.

Signed

Date

Deputy Upper Tribunal Judge Hutchinson

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

No fee award application was sought or is made.

Signed

Date

Deputy Upper Tribunal Judge Hutchinson