



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/36201/2013

THE IMMIGRATION ACTS

Heard at Field House

On 29 May 2014

Determination

Promulgated

On 12th June 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAKSHYAM RAJ GURUNG

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Presenting Officer

For the Respondent: Mr Puar, Solicitor

DETERMINATION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Handley who allowed the appeal by the respondent against the decision refusing to vary leave to remain and to

remove dated 20 August 2013 for reasons given in his determination dated 26 February 2014.

2. The respondent had arrived in the United Kingdom with a student visa on 25 June 2007 which was extended on application on various dates until 6 June 2012. On 31 May 2012 the respondent applied for leave to remain as the dependent son Prem Gurung, a former Ghurkha, who arrived in this country in 2010 with his wife. The respondent is an only son; his sisters are married, one lives in Hong Kong. The other is in the United Kingdom having been previously in the United States.
3. The respondent and his family are nationals of Nepal where the respondent was born on 30 May 1984. At the date of the hearing he was therefore 29.
4. The judge accepted that the respondent's father, his mother and sister now live in the United Kingdom and that, together with the respondent, they form a family unit. During their period of separation the respondent was financially dependent on his father and the family unit remained intact. He also accepted that family life continued after the respondent's father had arrived in the United Kingdom. It was clear that the respondent had not yet founded a family of his own. Prior to coming to the United Kingdom to study the respondent had always lived with his parents and that he continued to be financially and emotionally supported by the family.
5. After directing himself in accordance with *Ghising and Others* (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 the judge went on to conclude at [20] of his determination as follows:

“20. In the Appeal before me it has not been suggested that the appellant has failed to comply with the immigration laws of the United Kingdom or that he has been involved in any criminal activities whilst in the United Kingdom. As indicated, I accept that the appellant has a strong family life in the United Kingdom and I find that there are some factors which would make it difficult for him to return to Nepal (for example the fact the sponsor has disposed of the property he previously owned in Nepal). I accept that a high level of dependency exists between the appellant and the sponsor. I found no factors such as a bad immigration history or criminal behaviour which would be sufficient to outweigh the factors bearing on the appellant's side of the balance.

21. I allow this Appeal under Article 8 of the Human Rights Convention.”

6. The challenge by the Secretary of State asserts the following:
 - “i. The judge in the instant case gave great weight to the historic injustice in assessing proportionality in this matter. [After reference to the decision of the Court of Appeal in *Gurung and Others, R* (on the application of) *v SSHD* [2013] EWCA Civ 8.]

- ii. However, before proportionality falls to be considered, it must be found that the interference in a person's family life is sufficiently serious to engage Article 8 (*Razgar's* second question).
- iii. No such finding was made in this matter.
- iv. The appellant is an adult and has been throughout his application. He came to the UK in 2007, aged 23, without his parents to study. He retains family in Nepal. Any financial dependency arose from the appellant's status as a student; a time-limited status. Accordingly the relationship between the appellant and his parents does not go beyond the normal ties of affection between adults (*Kugathas*) and hence Article 8 was not engaged.
- v. The judge was wrong to proceed to proportionality, and weigh the historic injustice argument, absent the finding that Article was engaged."

Mr Walker candidly accepted his difficulties. He explained he did not pursue the grounds strongly. His instructions were to pursue the appeal but he had not a great deal to say given that the judge had found that there was family life. He made no challenge to the consequences of that family life having been found are with reference to the decision in *Ghising* [2013].

- 7. Mr Puar submitted that the Presenting Officer had conceded at the first hearing that there was family life and there was no proper basis for a finding of error of law on the grounds asserted by the Secretary of State.
- 8. My conclusions are as follows. The challenge by the Secretary of State was on the basis that no finding had been made that Article 8 was engaged. That is a misreading of the determination. The judge found that the respondent had strong family life in the United Kingdom. The grounds do not challenge the consequences of such a finding and even if they could be construed as doing so, the combined factors of:
 - (i) the sole reliance on effective immigration control as justification for interference with the family life in the Reasons for Refusal Letter dated 20 August 2013;
 - (ii) the strength of the family life as found by the judge; and
 - (iii) the absence of any adverse immigration history or evidence of involvement in criminal activities,

when considered in the light of the conclusion in *Ghising* [2013] at [60].

"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."

demonstrate that the judge did not err in allowing the appeal on Article 8 grounds. He reached a permissible conclusion after a correct direction as to the law and after making findings on the facts open to him on the evidence.

DECISION

9. The appeal by the Secretary of State in the Upper Tribunal is dismissed.

Signed

Date 12 June 2014

A handwritten signature in blue ink, appearing to read 'Busme', with a horizontal line extending to the right.

Upper Tribunal Judge Dawson