Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01648/2013
OA/01640/2013

THE IMMIGRATION ACTS

Heard at Field House
On 15 April 2015

Decision Promulgated
On 6 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

AWAKAS GURUNG
PUNAM GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Gareth Duncan counsel instructed by N C Brothers & Co
For the Respondent: Ms A Brocklesby-Weller

DECISION AND REASONS

Introduction

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 M Davies promulgated on 8 November 2013 which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellants are a brother and sister was born on 16 August 1990 and 26 October 1985. They were therefore aged 23 and 27 respectively at the time of the Judge's decision. They are nationals of Nepal.

4. The Appellant's father was issued with a settlement visa on 25 June 2009 outside of the Immigration Rules pursuant to Annex A of section 2A of Chapter 15 of the Immigration Directorate Instructions. The policy provides that any Ghurkha with more than four years service who had been discharged from the Brigade of Ghurkhas before the 1st of July 1997 will be eligible for settlement in the United Kingdom. The Appellants father met these criteria.

5. On 10 October 2012 the Appellants together with their mother applied for entry clearance as Ghurkha dependents.

6. On 6 December 2012 the Secretary of State refused the Appellants applications. The refusal letter gave a number of reasons:

   (a) The Appellants could not succeed under Appendix FM as adult dependent relatives as they did not meet the suitability requirements as the second Appellant had submitted a false document.

   (b) They did not meet the eligibility requirements of the adult dependent route as they did not have special personal care needs.

   (c) The discretionary adult dependent policy in relation to Ghurkhas was considered and no exceptional circumstances were found to warrant an exercise of discretion in their favour.

   (d) The decision did not engage Article 8 but even if it did the decision was proportionate.

The Judge's Decision

7. The Appellants appealed to the First-tier Tribunal together with their mother. First-tier Tribunal Judge Davies ("the Judge") dismissed the appeals of the two Appellant adult children against the Respondent's decision. The Judge found :

   (a) The Judge found that the sponsor was a broadly credible witness and set out in paragraphs 22 and 23 Mr Gurungs history.

   (b) He found that the Appellant's were financially dependent on Mr Gurung and there was no one else in Nepal on whom they could depend financially although they were able to live with their aunt and uncle in a property they owned.

(c) The third Appellant submitted a false document in relation to failing her examinations because she was ashamed that she had failed and her mother and brother did not know she had done this.

(d) The appeal in respect of the Appellant's mother was allowed as not in accordance with the law as she met the terms of the discretionary policy and was in breach of Article 8.

(e) The Appellants could not meet the requirements of the Immigration Rules as they did not meet the requirements for adult dependent relatives.

(f) Under the Ghurkha policy they do not have an entitlement or expectation that they would be granted entry clearance because they were both over 18 unless there were exceptional circumstances and the judge found none.

(g) In relation to Article 8 the Judge was referred to Ghising [2012] UKUT 00160 and R (on the application of Sharmilla Gurung and others) v SSHD [2013] EWCA Civ 8.

(h) The Judge accepted that family life existed between the Appellant s and the sponsor Mr Gurung and their mother. He accepted that it was more than emotional ties given the degree of financial dependency in relation to theri continuing education. He accepted the decision would interfere with their family life such as to engage article 8. He found that there was a legitimate aim.

(i) In considering whether the decision was proportionate (paragraph 34) he weighed into the decision the importance of effective immigration control. He took into account that the Ghurkha policy addressed the historic injustice but set out that discretion was not to be exercised unless there were exceptional circumstances. The Appellants were adults who had spent a considerable period living apart from their father and would continue to be financially supported so that they could complete their degree courses in Nepal. He found that the decision was proportionate.

8. Grounds of appeal were lodged arguing that:

(a) The Judges assessment of proportionality under Article 8 was flawed as he appeared to find that there had to be exceptional circumstances.

(b) He failed to take into account the principles in the case law to which he was referred in relation to the assessment of proportionality in applications made by Ghurkha dependent relatives.

(c) The Judge failed to give sufficient weight to the historic injustice.

9. On 18 December 2013 First tier Tribunal Judge Cheales gave permission to appeal stating :

> "It is arguable that in his considerations under Article 8 and proportionality considerations, the judge focused his attention on exceptional circumstances and failed to give enough weight to other factors, such as historic injustice."

10. At the hearing I heard submissions from Mr Duncan on behalf of the Appellants that :

    (a) There was a clear error of law in the proportionality assessment.

    (b) The Judge applied a test of exceptionality while it was relevant only in relation to the discretionary policy.

    (c) The case of Gurung was placed before the Judge and the case of Ghising sheds light on the principles set out in the earlier case.

    (d) The Judge found that family life existed between the parties and therefore the case came within the circumstances set out in headnote 4 of Ghising: there were no other countervailing features on the Respondent's side other than the maintenance of immigration control.

    (e) The only other factor the Judge had to consider was whether there had been an intention to settle and taking into account all of the evidence before him in the witness statements.

    (f) The clear outcome should have been allowing the appeal under Article 8.

    (g) Headnote 5 of Ghising makes clear that being a Ghurkha dependent was not a trump card where there was an adverse immigration history or criminal behaviour. There was no such evidence in relation to the First Appellant and in relation to the second Appellant while she had produced a false document the Judge placed no weight on it in the proportionality balance.

11. On behalf of the Respondent Ms Broklesby-Weller submitted that :

    (a) The Judge had applied the wrong test in relation to proportionality in that in referring to the absence of exceptional circumstances in his proportionality exercise he was reiterating a factor that was relevant only to the discretionary policy.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law in its assessment of proportionality under Article 8.

13. In May 2009, the Secretary of State announced that any Ghurkha with more than 4 years service who had been discharged from the Brigade of Ghurkhas before 1 July 1997 would be eligible for settlement in the UK, under the terms of a discretionary policy set out in the IDI, Chapter 15. Section 2A, Annex A. The policy permitted the spouse and minor children of eligible Ghurkhas to settle in the UK also, but only allowed adult children to settle on a discretionary basis where exceptional circumstances were found.

14. This was an application for entry clearance by the two adult dependent children of a veteran of the Brigade of Ghurkhas, Mr Gurung.

15. It is not in dispute that the Appellants' circumstances did not come within the provisions of the Immigration Rules or the discretionary policy but it was accepted

that the Judge was nevertheless entitled to consider whether the decision engaged Article 8 of ECHR.

16. The challenge in this case is that the judge had imported that test of exceptionality into the proportionality test that he carried out under Article 8. This is based on the fact that at paragraph 5 the Judge stated under the heading 'Issues on appeal' that he had to consider whether the Appellant could benefit from the policy or Article 8:

> "In respect of the second and third Appellants this essentially requires a finding as to whether exceptional circumstances exist justifying the exercise of discretion and rendering any refusal a disproportionate interference with family life." (my bold)

17. I have also considered under the findings at paragraph 34 where the Judge in his assessment of proportionality opens with the fact that he takes into account the weight to be given for the need for immigration control and taking into account the 'scheme for remedying the historic injustice':

> "The scheme is that adult dependent children would not usually join their parents if they are granted settled status unless there are exceptional circumstances. I have found there are no exceptional circumstances."

18. This apparent conflation of the requirements of the discretionary policy with the test to be applied under Article 8 is thus repeated in two sections of the decision. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different.

19. I am also satisfied that the Judge has failed to properly engage with the caselaw he was provided with and its guidance. While Mr Duncan suggested that the Judge did not have Ghising before him in fact at paragraph 32 it is plain that the case was before him. Given his other findings about the factual background which underpin the appeal and the guidance in Ghising I am satisfied that the failure of the Judge to identify any countervailing factors other than the importance of immigration control which rendered the decision proportionate was a material error of law.

20. I therefore found that errors of law have been established in relation to the Article 8 assessment of proportionality and that it should be set aside to be remade.

21. Both Mr Duncan and Ms Brockelsby–Weller were content for me to remake the decision without further submissions in the event that I found the error of law as I indicated that I did not propose to interfere with the factual findings made by the Judge.

Remaking the decision.

22. The factual background that underpins the proportionality assessment under Article 8 outside the Rules is undisputed and indeed it was conceded that the only issue for me to determine was whether the decision to refuse entry clearance against this background was proportionate.

23. The Appellants are the adult children of a 15 year veteran of the Ghurkhas Brigade. The Appellants were the children of his third marriage. Following his discharge on the completion of his engagement in 1978 the Appellants father returned to Nepal and remained until 1989 and he worked for a period in Saudi Arabia returning to Nepal for

two years in 1995 and then working in Hong Kong. The Appellants lived with their Aunt in Nepal during their parents work abroad at all times financially supported by him. It is accepted that the Appellants parents returned on a regular basis to Nepal and they visited Hong Kong.

24. The Appellants father applied for settlement in the United Kingdom after the introduction of the Home Office Ghurkhas Policy and his application was granted on 25 June 2009. He works in the United Kingdom and is in receipt of a pension.

25. It is accepted that the relationship of the Appellants with their parents goes beyond the normal ties and that they have always been financially dependent on him and they are presently at University funded by him.

26. I accept that had the Appellants had the opportunity to settle in the United Kingdom with their father when they were children, which they would have but for the historic injustice of the unequal treatment of Ghurkha soldiers, they would have done so and that desire for the family to be reunited persists to this day.

27. I take into account that now not only is the Appellants father settled in the United Kingdom but their mother has also been granted the right to settle.

28. I have considered whether it would be reasonable for the Appellants father and his wife to return to live with them in Nepal. I take into account that given the valuable service that the Appellants father rendered to the United Kingdom the Respondent has recognised his right and that of his wife to settle in the United Kingdom. I accept that the Appellants father sought to settle in the United Kingdom as soon as such a possibility became available to him. At the time of application the Appellants were attending University in Nepal and had accommodation in that they were living with their aunt. Since I heard this case there has been a catastrophic earthquake in Nepal so if anything their circumstances may well be far worse and because of the general country conditions at the time of writing this decision looking at their circumstances in the round as of today it would not be reasonable to suggest they could enjoy family life by all relocating to Nepal.

29. I take into account the requirements of s 117 of the Nationality, Immigration and Asylum Act 2002 in relation to the public interest. Therefore I take into account that immigration control is in the public interest. I take into account that they both have some English although the exact nature of their skill is unclear from the evidence. They are financially supported by their father who works and is in receipt of a pension.

30. In assessing the final question that I must ask in applying Razgar I have considered the two authorities provided to me Ghising and Gurung in particular the headnotes from Ghising:

> "(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.
>
> (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."

31. I have considered whether there is any other factor on the Respondent's side of the balancing exercise other than the requirement for immigration control. Certainly none was identified either in the refusal letter or in submissions before me. There was no adverse immigration history nor was there any criminal behaviour by either the Appellants or indeed their parents. The only issue that perhaps reflects poorly on the second Appellant is the fact that she submitted false documents which included a School leaving Certificate examination mark sheet and Higher Education Board certificate suggesting that she had passed those examinations. These were false and the Judge who heard evidence in relation to this issue from her parents concluded that she was too ashamed to tell her parents of this. I take this into account but I do not consider that the weight to be attached to this is such as to displace the view that in the circumstances of this case refusal would be disproportionate.

CONCLUSION

32. **I therefore found that errors of law have been established and that the Judge's determination should not stand in relation to Article 8.**

Decision

33. **There was an error on a point of law in the decision of the First-tier Tribunal with regard to Article 8 such that the decision is set aside**

34. **I remake the appeal.**

35. **I allow the appeal under Article 8 of the ECHR.**

Signed Date 5.5.2015

Deputy Upper Tribunal Judge Birrell