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

Appeal Numbers: HU/07309/2016
HU/07311/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 8 February 2018** | **On 28 February 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROOM**

**Between**

**MS BAL MUKARI MAGAR**
**MR JAGAT BAHADUR MAGAR**
(ANONYMITY DIRECTION NOT MADE)

Appellants

**and**

**ENTRY CLEARANCE OFFICER – NEW DELHI**

Respondent

**Representation:**
For the Appellant: Mr E Wilford, Counsel
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS ON ERROR OF LAW**

1. The appellants are the adult children of Mr Kharka Bahadur Magar, a former member of the Brigade of Gurkhas ("the sponsor"). They appealed decisions of the respondent Entry Clearance Officer, dated 17 February 2016, refusing them leave to enter to join the sponsor, who is settled in the UK. The dispute in these appeals has been whether the decisions

amounted to a breach of article 8. The respondent decided family life did not exist as between the appellants and the sponsor but, even if it did, any interference with family life was outweighed by the legitimate interest in maintaining effective immigration control.

2. The appeals were heard by the First-tier Tribunal, sitting at Hatton Cross, on 3 July 2017. The sponsor gave evidence. The judge carefully considered whether the facts showed that family life for the purposes of article 8 was in existence as between the appellants and the sponsor. In particular, she noted there were other siblings and a very large extended family living in Nepal. However, the appellants, who were 27 and 23 years of age at the date of application, were unmarried and had not started families of their own. The sponsor was in regular contact with them. The appellants were unemployed and dependent on the sponsor's financial support. The judge concluded she was "*just about persuaded on the balance of probabilities that family life does exist between the appellants and their father*".

3. Submissions were made to the judge that, when considering proportionality, the historic injustice accorded to Gurkha veterans should be taken into account and, if the appellants would have settled in the UK long before but for the historic injustice, the public interest in maintaining immigration controls would be outweighed (*Ghising and others (Ghurkhas/BOCs: historic wrong; weight)* [2013] UKUT 00567 (IAC), *Gurung & Others* [2013] EWCA Civ 8). The judge was not satisfied the sponsor would have settled in the UK long ago if he had had the opportunity to do so, noting that, having been granted entry clearance on 9 July 2009, the sponsor did not travel to the UK until 25 April 2012.

4. In any event, the judge considered the historic injustice factor was outweighed in the particular circumstances of the case. Firstly, taking account of section 117B, she noted the appellants did not speak English and, given their lack of education, they were unlikely to be able to find employment in the UK. Secondly, she noted that the sponsor had been complicit in his late wife's attempt to deceive the immigration authorities by including within a previous application a child who was not in fact her child but her grandchild. The judge noted the sponsor was unemployed and could visit or return to live in Nepal. He had no other relatives in the UK. The judge found it was appropriate to attach significant weight to the deception and she reasoned that the weight to be attached to the historic injustice or, as she put it, "the debt of gratitude" owed to the sponsor was significantly reduced.

5. Permission to appeal was refused by the First-tier Tribunal but granted on renewal by the Upper Tribunal. The grounds made the following points;

   - The judge's reasoning that the sponsor would not have settled in the UK in 1971 because of his actions in 2009/12 was, at its very best, "extremely tenuous" and was, in any event, incapable of determining the question of whether the appellant was subject to the historic

injustice. The correct test was whether the sponsor would or might have settled here but the judge only asked herself whether he would;

- The judge erred by recognising that, if all that was relied on in the public interest side of the balance were the interests of immigration control, the historic injustice factor would normally require a decision in the appellant's favour (*Ghising*);
- The judge erred by relying on the sponsor's deception and should have asked herself whether the appellants had a poor immigration history or criminal antecedents;
- The judge erred in her application of the factors in section 117B which did not represent a radical departure from nor override previous case law on article 8; and
- The judge erred by taking account of the fact the sponsor could return to Nepal as reducing the weight to the family life between him and the appellants.

6. I heard submissions from the representatives on the issue of whether the judge's approach to the question of family life was erroneous.

7. Mr Jarvis helpfully narrowed the issues. Firstly, he accepted the force of the submission that the judge erred in reasoning from the sponsor's behaviour in 2009/12 that he would not have settled in the UK in the 1970s. I agree. Such an inference could only rationally be drawn after making clear findings about the reasons behind the sponsor's decisions. Mr Wilford told me that this point was not taken in either the respondent's decision notices or by the presenting officer at the hearing in the First-tier Tribunal, where he represented the appellants. The judge's reasoning cannot support her conclusion.

8. This effectively opened the way to the appellants to argue that the historic injustice point should be accorded predominant weight in the proportionality balancing exercise, so there was material error in the judge's decision.

9. Secondly, Mr Jarvis accepted the judge erred in regarding the section 117B factors as capable of outweighing the historic injustice. There was some discussion as to the weight which could be accorded to section 117B factors in *Rai v Entry Clearance Officer, New Delhi* [2017] EWCA Civ 320, which appeared to support the view that they were unlikely to outweigh the historic injustice point (see Lindblom LJ at paragraph 57). I find the judge erred in this respect but such error would not have affected the outcome because it is clear that her primary reason for dismissing the appeals was that the historic injustice factor did not carry its usual weight on the facts of the case.

10. The representatives agreed that the determinative issue in this appeal was whether the judge was entitled to find the fact the sponsor connived in the

deception practised by his late wife in her entry clearance application was a matter which could outweigh the historic injustice.

11. In *Ghising*, the Upper Tribunal explained the following in relation to the historic injustice point:

> "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:
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> > "... 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]
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> 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."

12. In this case, Mr Wilford argued, the appellants did not have a bad immigration history and the judge should have focused on this, not the deception by his mother. In reply, Mr Jarvis said the authorities did not specify precisely what was capable of outweighing the historic injustice

point. In fact, the Court of Appeal in *Gurung* said that courts should be wary of attempting to give prescriptive guidance as to the weight to be given to particular factors in the balancing exercise (see paragraph 36). He said judges should take account of everything and the question of weight would be for them. The deception was plainly capable of being materially significant and the judge was entitled to find the debt of gratitude owed was reduced. Mr Wilford said that, even if Mr Jarvis were correct, he would argue that, on the facts, the deception was not capable of outweighing the historic injustice. The focus should be on the effect on the appellants and their family life.

13. I reserved my decision on the question of whether the judge's decision contains a material error of law.

14. At paragraph 16, the judge said this:

> "I have considered what, if any, weight I should attach to the fact that the appellants' mother sought to deceive the immigration authorities in her application for entry clearance by falsifying details to suggest that her grandson was in fact her son. Her application was refused as a result of the deception and she has since died. I consider it highly likely that [the sponsor] himself was complicit in the false claim. As the person sponsoring the fraudulent application, and who would have been receiving into his home the grandson had the deception been successful, I find that he must have been aware that a false application was being made. As a result, I do consider it appropriate to attach significant weight to this factor. I accept that the appellants themselves may have played no part in the deception. However, it is only due to [the sponsor's] positive act of serving [in] the armed services of this country that the appellants even have any potentially viable basis for applying for entry clearance at all. Were it not for the fact that [the sponsor] is a Gurkha veteran, the appellants would have no arguable case for obtaining entry clearance. I find that the debt of gratitude owed to [the sponsor], and the weight to be attached to the historic injustice, is significantly reduced in this case by the fact that he and his wife sought to deceive the immigration authorities of the country that he once served."

15. I note the mother's application was refused in January 2012. The notices of decision record that the appellants' mother presented a "kindred roll" document which recorded one Kamal Kumar as being their firstborn child, whereas DNA evidence established he was their 7-year old grandson. It is unclear whether the appellants were also seeking entry clearance at that time. They were both over 18. I take the judge to have found they were not complicit in the deception, even if they were applicants. The deception did not operate on these applications.

16. There was some discussion as to whether the benefit to be afforded to ex-Gurkha families as a result of the historic injustice vests solely in the sponsor, to whom the debt of gratitude is owed, or also in his dependants. If it is the former, then it could be argued it had been lost or reduced as a

result of the sponsor's actions. If it is shared between them, then this would not necessarily follow.

17. Ultimately, I do not consider that this helps to resolve the appeal. The authorities do not specify what may or may not be taken into account and it is a matter for the judge as to the weight to be given to any individual factor. I consider the judge was entitled to take account of the deception, at least to the extent that the dilution of the strength of the historic injustice factor would be a disbenefit to the sponsor (who wanted his children to join him in the UK). It was not an error to take it into account.

18. The fact the appellants were not complicit in the deception would, all things being equal, reduce to the weight to be given to it. Mr Wilford's second argument can therefore be taken together with the first. However, once it is clear that the judge was entitled to regard the weight to be given to the historic injustice should be reduced, it is very difficult to show the judge erred in giving any individual factor a certain weight. She heard all the evidence and, having made her findings, approached her task as to how the balancing exercise should be resolved with care. In my judgment, it cannot be said that it was not open to the judge find that the public interest prevailed in this case.

19. There is no error of law in the First-tier Tribunal's decision to dismiss the appeals and her decision shall stand.

**Notice of Decision**

The Judge of the First-tier Tribunal did not make a material error of law and her decision dismissing the appeals on article 8 grounds is upheld.

No anonymity direction is made.

Signed Date 9 February 2018

**Deputy Upper Tribunal Judge Froom**