



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/06681/2016**

**Appeal Numbers:**

**HU/06690/2016**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision & Reasons  
Promulgated  
On 9<sup>th</sup> April 2018**

**On 16<sup>th</sup> March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MISS SANJU CHAND (FIRST APPELLANT)  
MISS SANJITA CHAND (SECOND APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr E Wilford, Counsel

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are sisters and they are born respectively on 11<sup>th</sup> October 1987 and 24<sup>th</sup> June 1989. They are both citizens of Nepal. The Appellants made application seeking entry clearance to the United Kingdom as the adult dependent children of Dipak Kumar Chand a former Gurkha soldier. Their applications were refused by Notice of Refusal dated respectively 16<sup>th</sup> and 24<sup>th</sup> February 2016. The Appellants appealed and their appeals

came before Judge of the First-tier Tribunal Rahman sitting at Taylor House on 29<sup>th</sup> June 2017. In a decision and reasons promulgated on 17<sup>th</sup> July 2017 the Appellants' appeals were allowed pursuant to Article 8 of the European Convention of Human Rights.

2. On 17<sup>th</sup> July 2017 the Secretary of State lodged grounds to appeal to the Upper Tribunal. On 18<sup>th</sup> January 2018 Judge of the First-tier Tribunal Cruthers granted permission to appeal. To quote verbatim from Judge Cruthers' grant:

"In my assessment it is arguable, as per the grounds on which the Respondent seeks permission to appeal, that the judge may have erred in at least the following respects:-

- As per paragraph 1 of the Respondent's grounds, I consider it arguable that the judge may have treated 'the historic injustice argument' (which is common to most Gurkha dependent entry clearance cases) as some sort of trump card outweighing any such factors as could be taken to militate against the Appellants' case for entry clearance ('the *Ghising* point')
- As per paragraph 3 I consider it arguable that the judge may have erred when he found that 'family life' (for the purposes of Article 8) exists between the Sponsor and the Appellants ('the *Kugathas* point')
- As per paragraph 6 it is arguable that the judge has not appropriately factored in potential 'Part 5A factors' - such as whether the Appellants speak English, and whether the Sponsor is in a position to maintain the Appellants in the UK without recourse to public funds."

Overall Judge Cruthers therefore concluded that there was sufficient weight within the grounds to make a grant of permission appropriate.

3. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel, Mr Wilford. Mr Wilford is familiar with this matter having appeared before the First-tier Tribunal. The Respondent appears by her Home Office Presenting Officer, Mr Tarlow. I note that this is an appeal by the Secretary of State. For the purpose of continuity throughout the appeal process Miss Sanju and Miss Sanjita Chand are referred to herein as the Appellants and the Secretary of State as the Respondent.
4. Mr Wilford has produced to me a very helpful skeleton argument which he asks stands both as his skeleton and in response as a Rule 24 reply. Mr Tarlow has no objection to it being admitted in evidence.

## **Submissions/Discussion**

5. Mr Tarlow relies on the Grounds of Appeal. He submits that the key findings in these appeals are to be found at paragraphs 67 and 68 and that what the Tribunal has done is find that the historical injustice argument trumps all other elements within the proportionality assessment and within Section 117B of the 2002 Act. Further he submits that the Tribunal has started on the wrong foot by assuming that it is an objective fact that all Gurkha children remain in a state of absolute dependence upon their parents until the child gets married and that is not supported by the facts of this case which shows that the Sponsor and his wife came to the UK in 2013 and 2014 and consequently if there had been a dependence as stated then this separation would not have happened. Further he submits that the Tribunal found that the Appellants were emotionally dependent upon their parents due to frequent contact. He submits that this does not demonstrate emotional dependency to the *Kugathas* standard and points out that the Appellants' case is consequently not made out.
6. He acknowledges that the Entry Clearance Officer does not dispute that a family life exists simply that the evidence does not show elements of dependency beyond the normal emotional ties. Further he considers that the judge has not made appropriate factual findings pursuant to Section 117B regarding public interest considerations and that there are no findings for example on the Appellants' ability to speak English, to maintain their financial independence or to integrate into British society.
7. Mr Wilford addresses the points as set out by Judge Cruthers in turn. Firstly he turns to what he calls the *Ghising* issue. He notes that the Secretary of State's grounds assert that the judge gave inappropriate weight to the historic injustice albeit that he notes that the Respondent does not dispute the fact that the family have been subjected to historic injustice. Further he points out that the First-tier Tribunal Judge accepted the evidence of the Appellants' father that he would, had he been able, have applied to settle in the UK upon discharge. He submits that there has been no reference made to the finding of the Upper Tribunal in *Ghising and Others (Gurkhas/BOCs; historic wrong; weight) [2013] UKUT 567 (IAC)* and the fact that in such circumstances there is usually a finding in the Appellant's favour. Secondly he turns to what he describes as the *Kugathas* issue and the point that the Secretary of State asserts that the judge erred in finding at paragraph 63 that Article 8(1) was engaged founded upon a fundamentally flawed conception of the relevant principles governing the issue: namely that "absolute dependence" is the basis of existence of family life such as to engage Article 8(1) between adult children and their parents. He suggests that there has been a mistake herein by the Secretary of State and that the test for Article 8 he reminds me of family life between adults is whether "something more exists than normal emotional ties" and that such relevant factors include who are the near relatives, the nature of the links, age, where and with whom the Appellant has resided in the past and forms of contract. He submits that it is clear that the judge has at paragraphs 60 and 61 taken in all the relevant factors in the grounds and has gone on to reject the approach

that was taken when the judge fell into error in the Upper Tribunal in *Rai* that if the dependence had been as stated the separation would not have happened.

8. Thirdly, Mr Wilford addresses what Judge Cruthers has referred to as the Part 5A factors. He submits that contrary to what Judge Cruthers suggests the judge in the First-tier Tribunal acted entirely appropriately because firstly at paragraph 68 he has explicitly referred to Part 5A of the 2002 Act and that secondly the only two relevant subSections can possibly be Sections 117B(2) and (3). He refers me to them and points out that they do not prescribe outcome but process and he points out that Part 5A is codifying legislation and that it does not disturb the findings of the Upper Tribunal in *Ghising No. 2*. He submits that considerations under this Rule cannot affect the outcome of this appeal and that the judge has taken into account paragraphs 2 and 3 of Section 117B. He asked me to dismiss the appeal and to find that there is no material error of law in the decision of the First-tier Tribunal Judge.

## **The Law**

9. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
10. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## **Relevant Case Law and Statutory Authority**

11. In *Ghising and Others (Gurkhas/BOCs: historic wrong; weight)* [2013] UKUT 567 (IAC) the court made the following findings:

“(1) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less

than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in *Gurung and others [2013] EWCA Civ 8* did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments.

- (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).
- (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.
- (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."

12. Further within that decision the Tribunal at paragraphs 59 and 60 said:

"59. 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.

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.”

13. Section 117B(2) provides:

*“It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*

- (a) are less of a burden on taxpayers, and*
- (b) are better able to integrate into society.”*

Section 117B(3) provides:

*“It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent ...”*

### **Findings on Error of Law**

14. This is a judge who has given very careful consideration to the facts of this matter. He has taken into account the relevant law and I do not find that the argument set out by the Secretary of State that he has purportedly misapplied the historical injustice as an element that trumps all other elements of the proportionality assessment to be correct. Quite simply, consideration and an analysis of what the judge says at paragraph 67 does not support such contention albeit that I acknowledge that therein the judge does make reference to the phrase “historic injustice”. He cannot however be criticised for his conclusions.

15. So far as the allegation made therein relating to the suggestion that the tie does not demonstrate emotional dependency to the *Kugathas* standard

this is I conclude wrong as a basic supposition. What effectively this amounts to is a disagreement with the finding of the judge. The judge has at paragraphs 60 and 61 considered in detail the relevant factors in the appeal and has made findings thereafter that he was entitled to. This is a judge who has given a very careful analysis to the authorities and to the factors to be taken into account such as being single, having no children, not finding a family of their own, financial dependence, emotional dependence, cultural considerations and living together. He has looked at all matters in the round and has given his reasons quite properly as to why *Kugathas* can be distinguished. Further the judge has gone on to take into account paragraphs 2 and 3 of Section 117B and I agree with the submission made by Mr Wilford that they do not prescribe outcome but process.

16. Overall this is a very well-constructed and put together decision. The decision discloses no material error of law and the submissions made by the Secretary of State amount to little more than mere disagreement and an attempt to challenge the decisions of the First-tier Tribunal Judge. In such circumstances I find that there is no material error of law in the decision of the First-tier Tribunal Judge and the Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

### **Notice of Decision**

The decision of the First-tier Tribunal Judge discloses no material error of law. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

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

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris