Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16807/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th November 2014	**On 8th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MISS BINDIYA RANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr Ball – Counsel, instructed by Howe & Co
For the Respondent: Mr Tarlow – Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Miss Bindiya Rana, a citizen of Nepal born 9th December 1989. She appeals against the decision of the Entry Clearance Officer (ECO) made on 30th July 2013 to refuse entry clearance to settle in the UK as the dependent of her father, an ex-Gurkha soldier. The application was made on 20th May 2013. The Appellant

appealed against that decision and her appeal was allowed by First-tier Tribunal Judge David Clapham on human rights grounds following a hearing on 28th May 2014.

2. The Secretary of State appealed against that decision and on 4th September 2014 having heard submissions, I found that Judge Clapham had made a material error of law in his determination and I set it aside with no preserved findings of fact.

3. I now proceed to remake the decision.

4. The position of the ECO in this case is as follows.

5. He accepted that the Appellant's father, her Sponsor, is present and settled in the UK. At the time the decision was made the Appellant's mother was still in New Delhi but a visa for entry clearance to the UK had been issued to her on 18th July 2013 and she subsequently travelled to the UK. The Entry Clearance Officer considered the Appellant to be a fit and capable 23 year old adult female able to look after herself. She had just completed a Bachelors Degree in Social Sciences. He noted that there was a discrepancy in her date of birth in that her birth certificate and other documents put this as 9th December 1989 and her father's Army Kindred Roll says she was born on 10th December 1990. The view of the ECO was that her father would have had to have provided documentation to support the date of birth of 10th December 1990 at the time of registration onto the Kindred Roll and the discrepancy was unexplained. He took into account that she had not provided any evidence of her father's income or means of support in the UK.

6. He went on to consider her application under the Secretary of State's policy for dependants over the age of 18 of Foreign and Commonwealth and Other HM Forces members as set out in IDI Chapter 15 Section 2A 13.2. He noted that this policy allows for applications where there are exceptional circumstances and said that he was not sure what the exceptional circumstances were in the Appellant's case so her application would fail. She had not shown anything beyond a normal relationship between parents and adult children and that is not sufficient. There is nothing that would lead to a discretionary grant of leave outside the Rules. She lives in her father's property with her mother and brother and has just completed a degree which will stand her in good stead in getting a job. Her mother could remain with her in Nepal. It is a matter of choice whether she does or not.

7. He said that it would have been clearly understood by her father that he would not have the right to settle in the UK on completion of his service. He is now entitled to reside in the UK but is not obliged to. Ex-Gurkhas cannot bring their adult children to the UK with them unless they can either satisfy the requirements of the Immigration Rules or bring themselves within the ambit of the applicable published policy of the Secretary of State.

8. He acknowledged the historic injustice and its consequences suffered by former members of the Brigade of Gurkhas and accepted that the Secretary of State had made special provisions for their entry to the UK outside the Immigration Rules as an acknowledgement that it is in the public interest to remedy the injustice but went

on to say that there is no guarantee that the Appellant's father would have taken up the opportunity to settle immediately upon his discharge from service. Her parents had chosen to apply for settlement visas knowing that their adult children would not automatically qualify for settlement here. There is no bar to one or other or both of them remaining in Nepal with her.

9. The decision was reviewed on 20th January 2014 by the Entry Clearance Manager (ECM) who upheld it.

10. The position of the Appellant as set out in the Grounds of Appeal and in the skeleton argument provided at the hearing before me is as follows. Reliance is placed on the IDI referred to above at Chapter 15 Section 2A 13.2. This policy is the same as that considered in **R (Gurung) v SSHD [2013] EWCA Civ 8**. In that case it was said:

> "In exceptional circumstances discretion may be exercised in individual cases where the dependant is over the age of 18."
>
> "For many years, Gurkha veterans were treated less favourably than other comparable non-British Commonwealth soldiers serving in the British Army. Although Commonwealth citizens were subject to immigration control the SSHD had a concessionary policy outside the Rules which allowed such citizens who were serving and former members of the British Armed Forces to obtain on their discharge indefinite leave to enter and remain in the UK. Gurkhas were not included in this policy. They were therefore not entitled to settle in the UK."

The caselaw has established that Gurkhas were unfairly excluded from this concession and that they suffered a "historic injustice" in being deprived of their right to settle in the UK.

11. At paragraph 42 of **Gurung** the Court of Appeal said:

> "If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependent (now) adult children would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now."

In doing this the Court of Appeal affirmed the decision of the Upper Tribunal in **KG (Gurkhas – over age dependants – policies) Nepal [2011] UKUT 137** where it was held that the historic injustice suffered by the Gurkha veterans and their families reduces the weight to be put into the public interest side of the balance when considering Article 8 ECHR.

12. Reliance is then placed on the decision of the Upper Tribunal **Ghising and Others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567** in particular headnotes 4 and 5 which say:

> [4] 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.

> [5] … 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.

13. With regard to Article 8 paragraphs 51 to 61 of **Ghising** are relied upon.

14. I have statements from the Appellant and her family. The Appellant says that she is totally dependent on her parents financially, emotionally and in all basic things. Culturally Gurkha girls remain at home with their parents until they are married. She and her parents speak three times a week on the phone. They cannot do it more often because of the expense. She wants to live with her parents.

15. In his statement the Appellant's father confirms that he was granted indefinite leave to remain on 25th May 2010 under the Gurkha policy. He was a British Gurkha soldier for over seventeen years. When he was discharged in 1984 there was no settlement policy in place but had he been allowed to apply for settlement at that time he would have done so. The Appellant would then have been born in the UK. He submits that there are exceptional circumstances in his daughter's application i.e. the historic injustice suffered by Gurkha veterans. He maintains a family life with his daughter. In their culture an unmarried child is the sole responsibility of her parents until such times as she marries. The right to remain in the UK would be a hollow one if their daughter could not join them.

16. I heard oral evidence from the Appellant's father who adopted his statement. He confirmed that he was discharged from the Brigade of Gurkhas in October 1984 and went to Brunei to join a Reserve Unit. At that point his wife was in Nepal. His daughter was born in December 1989. She is studying at a college in Kathmandu and is currently living there – away from home. He arranged rented accommodation for her there. He pays for her education and her living costs. He came to the UK in 2010 and his wife joined him in February 2014. In re-examination he confirmed that he did not come to the UK to settle in 1984 because there was at that time no scheme that would enable him to do that.

17. The Appellant's mother gave evidence adopting her statement.

18. In his submissions Mr Tarlow said that the Appellant's daughter was not born at the time her father was discharged from the Brigade of Gurkhas so it is perverse to suggest that he could have come here with her at that point.

19. Mr Hall submitted that Mr Tarlow is wrong. The Appellant's father was clear in his evidence that had he been allowed to apply to come to the UK when he was discharged he would have done so. If he had done this his daughter would have been born here. The fact that he went to Brunei is indicative of the fact that he was

willing to move from Nepal. The fact that the Appellant was not born at the time is not fatal to her application. Article 8 is engaged. The interference with her family life is disproportionate because the only reason she is not able to come is that her father was wrongly and unfairly disbarred from coming to the UK in the first place, a wrong that was not put right until 2009. The historic injustice of itself is sufficient to render the decision to refuse her leave disproportionate to the need for effective immigration control in the UK. There are no countervailing reasons in this case. She has no poor immigration history.

My Findings

20. I have given careful consideration to all the evidence put before me in this case.

21. The Appellant's father retired from the Gurkhas in 1984, five years before the Appellant was born at which time he had one child, a son born in 1978 who according to the evidence lives with the Appellant in the family home. He says that had it been possible to come to the UK then he would have come and his daughter, the Appellant, would have been born here.

22. What the Upper Tribunal panel in **Ghising** said, having noted that the Secretary of State had made special provision for entry to the UK outside the Immigration Rules of Gurkha veterans and their families as an acknowledgement that it is in the public interest to remedy the historic injustice perpetrated upon them, was:

> "Given that the Gurkhas are Nepali nationals, it is not inherently unfair or in breach of their human rights to distinguish between Gurkha veterans, their wives and minor children on the one hand, who will generally be given leave to remain, and adult children on the other, who will only be given leave to remain in exceptional circumstances. The scheme that the Secretary of State has developed is capable of addressing the historical wrong and contains within it a flexibility that, in most cases will avoid conspicuous unfairness."

23. I note that the court in **Ghising** took into account that the Appellant in that case, a young adult male, was still living at home and was studying. The court took into account that he enjoyed a close knit family life with his family and they depended on each other for mutual support and affection. Even when he came to the UK to study he remained financially and emotionally dependent on his parents and their normal family life resumed as soon as his parents were able to settle in the UK.

24. In **Entry Clearance Officer, New Delhi v KG [2011] UKUT 117** the Upper Tribunal held that the public interest in maintaining fair and firm immigration control was not as strong as usual because of the existence of a policy outside the Immigration Rules provided for admission of those such as the Appellant and because the Appellant could have come to the UK as a minor if Gurkha veterans had not been wrongly prevented from settling here at an earlier date. It was in May 2009 that the Secretary of State announced that any Gurkha with more than four years' service who had been discharged from the Brigade of Gurkhas before 1st 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. This permitted the spouse and minor children of

eligible Gurkhas to settle in the UK but only allowed adult children to settle on a discretionary basis. Mrs Justice Lang indeed said in **Ghising**:

> "The scheme that the Respondent has developed is, therefore, capable of addressing the historical wrong and contains within it a flexibility that in most cases will avoid conspicuous unfairness. Furthermore, although not an Immigration Rule the Respondent could not properly fail to adopt the obligation set out in paragraph 2 of the Rules, namely that decision-makers within the Home Office and UKBA should perform their duties so as to comply with the provisions of the Human Rights Act 1998, in particular the judicious recognition of exceptional circumstances in the case of an adult dependant. "

She went on to say at paragraph 120 that the impact of the historic injustice and its consequences on proportionality as assessed under Article 8 is limited.

25. In **Gurung** the Court of Appeal said,

> *(i)* 'The general rule stated in the policy in relation to the dependant adult children of Gurkhas is not so ambiguous in its scope as to be misleading as to what would be a sufficient reason to substantiate a discretionary claim to settlement. On the contrary, the general rule is clearly stated in Annex A. It is that dependant adult children will not "normally qualify for the exercise of discretion in line with the main applicant". The normal position is that they are expected to apply for leave to enter or remain under the relevant provisions of the Rules (Rule 317(i)(f)) or under the provisions of article 8 of the ECHR. There is nothing ambiguous or unclear about this. That is the general position.
>
> *(ii)* We accept the submission of Ms McGahey that the historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair immigration policy. It is not necessarily determinative. If it were, the application of every adult child of a UK-settled Gurkha who establishes that he has a family life with his parent would be bound to succeed. Mr Drabble does not contend for this extreme position and it is not supported by the approach adopted in the BOC cases to which we have referred.'

26. I accept therefore that in considering Article 8 ECHR the historic injustice and its consequences are to be taken into account. I do not accept the implication in the submission made by the Appellant's father in his statement and by Mr Ball on his behalf that the historic injustice of itself constitutes an exceptional factor warranting an automatic grant of leave to adult children under Article 8. Neither the Home Office Policy nor of the caselaw supports such an argument.

27. The first question that must be addressed is whether the Appellant and her parents enjoy family life together and if they do what the strength of that family life is. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case.

28. In **Gurung t**he Court said,

> 'The critical issue was whether there was sufficient dependence, and in particular sufficient emotional dependence, by the appellants on their parents to justify the conclusion that they enjoyed family life. That was a question of fact for the FTT to

determine. In our view, the FTT was entitled to conclude that, although the usual emotional bonds between parents and their children were present, the requisite degree of emotional dependence was absent.'

29. Lord Bingham in **EB (Kosovo) v Home Secretary [2008] UKHL 41 [2009] 1 AC 1159** at paragraph 12 said:

> "There is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which Article 8 required."

30. In **Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)** there is a discussion of family life between adults. Of **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31** it is said,

> 'We observe at the outset that the facts in **Kugathas** were strikingly different from the facts in this case. Mr Kugathas was a national of Sri Lanka, aged about 38, who had moved to Germany with his mother and siblings, as refugees, about 17 years earlier. Mr Kugathas had been living on his own in the UK for about 3 years, and the only contact he had had with his family was one visit of 3 weeks duration from his sister, her husband and child, and periodic telephone calls. The Court of Appeal held that he did not enjoy family life with his family in Germany, within the meaning of Article 8(1).

In **Kugathas,** at [14], Sedley LJ cited with approval the Commission's observation in **S v United Kingdom (1984) 40 DR 196**:

> "Generally the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

Sedley LJ accepted the submission that 'dependency' was not limited to economic dependency, at [17]. He added:

> "But if dependency is read down as meaning "support" in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies."

Arden LJ said , at [24] – [25]:

> "24. There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.

> 25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties... Such tie might exist if the appellant were dependent on his family or vice versa."

31. The Tribunal went on to consider decisions of the European Court of Human Rights noting that some of the Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence. They noted that the ECtHR had reviewed the case law, in *AA v United Kingdom* (Application no 8000/08), finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. They accepted that it has been recognised that family life may continue between parent and child even after the child has attained his majority:

32. The Tribunal also cited Sedley LJ in **Patel & Ors v Entry Clearance Officer Mumbai [2010] EWCA Civ 1330** -

> "You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase".

33. I accept that the Appellant is financially dependant on her parents and bearing in mind the mores of her culture I accept that she has some emotional dependency on them. I do however have some concerns about the claimed strength of any family life they can be said to enjoy together. I feel that I was not given clear information about the Appellant's life in Nepal and in particular about her personal and private life there. There is nothing in any of the statements to indicate that she was living away from home. This only came to light as a result of questions asked of her father in the course of his oral evidence. The Appellant did not in her statement give any detail of her studies. According to a chronology provided she started her course in 2011 so presumably had been away during term time for around two years before her mother left Nepal. It seems reasonable to assume that she has friends and a private life in Kathmandu, a large city which according to her father's evidence is a day's bus ride from her home. This would have been the situation at the date the decision was made. There was also only a passing mention of the Appellant's brother with whom it is said she lives in the family home. The Appellant is 25 years old. She has been living in rented accommodation in Kathmandu and attending college. Her mother made the decision to leave her pending the outcome of this appeal presumably in the knowledge that entry clearance may not be granted. She did indeed say that they could not afford the application fees for her to come to the UK at the same time as her husband. The Appellant is not alone even when she is living in the family home. I am urged to give great weight to the cultural mores of Nepal but I not satisfied in all the circumstances that such considerations detract sufficiently from the other relevant factors such as her independent life as a student, her age and the fact that her brother also occupies the family home to justify a finding that her relationship with her parents as a 25 year old adult goes beyond normal emotional ties and thus engages Article 8.

Notice of Decision

The decision of the First-tier Tribunal has been set aside and replaced with this decision.

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed Date: 6th January 2015

N A Baird
Deputy Judge of the Upper Tribunal