Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02872/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2017	**On 15 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

ENTRY CLEARANCE OFFICER

Appellant

and

PHURBA TAMANG
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. S Jaisri, of Counsel, instructed by Sam Solicitors
For the Respondent: Mr. D Clarke, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Entry Clearance Officer (hereinafter "the ECO") appeals with permission against the decision of the First-tier Tribunal (Judge Abebrese) who, in a decision promulgated on 27 March 2017, allowed the Respondent's appeal against the decision of the ECO to refuse to grant entry clearance to settle in the UK as the adult dependant relative of his father, Mr Nar Bahadur Tamang, who is an ex-Gurkha soldier.

2. Whilst the Appellant in these proceedings is the ECO, for the sake of convenience, I intend to refer to the parties as they were before the First-tier Tribunal.

Background

3. The Appellant applied for entry clearance to settle in the UK as the adult dependant relative of his father.

4. The Respondent considered his application under the Home Office policy outlined in Annex K, IDI Chapter 15, section 2A 13.2 as amended on 5 January 2015, as well as under Article 8 of the ECHR. The Respondent noted that the Appellant's father and mother were issued with entry clearance on 8 September 2009 and 24 March 2010, and had been settled in the UK since 23 February 2010 and 28 January 2012 respectively.

5. The Respondent further noted, inter alia, that the Appellant had been living apart from his parents for more than two years as a direct result of their migration to the UK rather than as a result of the Appellant being away from the family unit as a consequence of educational or other requirements. She also noted that neither parent had chosen to remain with the Appellant despite a previous application for entry clearance being refused. In the light of that, she was not satisfied that the Appellant met the requirements under Annex K, Paragraph 9(8) of IDI Chapter 15 Section 2A 13.2.

6. Further still, it was noted the Appellant applied for a visa two-days before his 28th Birthday, years after his parents migrated to the UK. There was no evidence that any care arrangements were in place before they migrated which suggested the Appellant, who was living alone in rented accommodation away from the family home when his mother was in Nepal, could care for himself. It was noted the Appellant was in good health, engaged in degree level studies and had prospects of future employment in Nepal. There were also no reasons why his father could not continue to financially support him in Nepal. Thus, he failed to show that he satisfied paragraph 9(5) of Annex K of the revised policy.

7. The Respondent also considered and refused the application under Article 8 of the ECHR. She did not accept there was family life between the Appellant and his parents and, in the event that there was an interference, the ECO took into account the factors noted hitherto and concluded that they outweighed the consideration of historic injustice. Accordingly, she concluded that the refusal was justified and proportionate.

8. The Appellant exercised his right to appeal that decision having submitted written grounds in support which expressly referred to the Appellant circumstances, which were relevant to the application of the revised policy. The appeal came before Judge Abebrese on 7 March 2017. He heard the oral evidence of the Appellant's parents and considered the documents provided, including a witness statement from the Appellant, and allowed the appeal on human rights grounds.

9. The ECO sought permission to appeal that decision. Essentially, it was argued that the judge's approach to Article 8 was flawed; first, the judge's

finding that there was family life between the Appellant and his parents failed to consider the issue of dependency in accordance with the decision in Kugathas v SSHD [2013] EWCA Civ 31; second, the judge failed to properly consider section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and third, the approach taken to the historic injustice argument was inadequately reasoned and did not of itself answer the proportionality question.

10. Permission was granted by the First-tier Tribunal on 15 June 2017.

11. Thus, the matter came before the Upper Tribunal. Mr Clarke appeared on behalf of the ECO and Mr Jaisri, who appeared before the First-tier Tribunal, represented the Appellant. I heard submissions from each of the parties which I will go on to consider when reaching a decision on whether the judge erred in law.

12. The first ground, as set out in the written grounds, is essentially that the judge failed to properly apply the test in Kugathas. Mr Clarke referred to PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 in support of his submission that there was no evidence of dependency going beyond normal emotional ties.

13. Mr Jaisri on behalf of the Appellant submitted that the ECO's challenge amounted to a disagreement with the judge's findings; he lawfully considered the issue of whether family life was engaged under Article 8 (1) of the ECHR and made adequate findings of fact on the evidence, concerning financial dependency between the parties and also emotional dependence based on ongoing communications between the family members concerned and family visits that had taken place over significant periods.

14. I have considered the submissions in the light of the judge's assessment of the factual circumstances of the Appellant and his family members. There does not seem to be any dispute about the main factual circumstances. The Appellant was born in 1987; he was aged 27 when the policy to admit the adult children of former Gurkhas was introduced on 5 January 2015. His father was an ex-Gurkha who had served with the British Army Brigade of Gurkhas for 18 years and 117 days with exemplary military conduct. He was deployed to serve in the Falkland's War and awarded with a long service, Brunei and Silver Jubilee medal. He was discharged on 19 March 1987 at the rank of Sergeant. The Appellant's father and mother moved to the United Kingdom to live in 2010 and 2012 respectively. These facts were uncontroversial and unchallenged.

15. As to the circumstances prior to his parents moving to the United Kingdom, it was the Appellant's claim that whilst he was living alone in rented accommodation to complete his education when his mother left Nepal, he has always lived with his parents as part of the family unit and that he was and is both financially and emotionally dependent upon them. The judge comprehensively recorded the Appellant's claim at paragraphs 13 – 20, including the oral evidence at paragraphs 19 – 20. It does not

appear from the decision that the Appellant's parents were subject to any significant cross-examination.

16. The Appellant had stated that he was a student and that he was living alone in rented accommodation after his parents left. The Appellant's parents had put in place care arrangements, including financial provision. The Appellant stated that he found it difficult to be apart from his parents. His father had visited him from 12 July 2010 to 24 December 2011; 7 December 2012 to 1 March 2013 and 23 November 2014 to 15 February 2015. His mother visited from 7 December 2012 to 1 March 2013; 5 November 2013 to 15 February 2014; 29 April 2014 to 15 February 2015 and 7 March 2016 to 23 April 2016. Her last trip scheduled for 23 November 2016 was cancelled due to her ill-health. The judge accepted the credibility of all the evidence.

17. The judge properly identified at [23] that the Appellant could not satisfy Annex K in that he was not able to show that he had not been apart from his father for a period of two years or less.

18. In recognition that this was a human rights appeal, the judge proceeded to consider the five-step approach set out in Razgar v SSHD [2004] UKHL 27. The judge noted at [23] that the Appellant had been apart from his father for five years and his mother for over 3 years, but nevertheless found that the care arrangements put in place by the parents indicated that they *"still continued to provide him* [the Appellant] *with effective and real family support by way of financial and emotional."* (sic). The judge found the ECO's decision constituted an interference with family and private life. The judge considered the frequency of the visits made by the Appellant's parents and the Appellant's reliance on them for his "*total support".*

19. In deciding whether the decision had consequences of such gravity as potentially to engage the operation of Article 8, the judge found the Appellant's father who was discharged before 1997 was denied an opportunity to apply for settlement until 2004. With reference to the decisions in Limbu and Gurung the judge found that there had been historic injustice denying the Appellant a fair opportunity to apply before he reached the age of majority and noted that he would have been permitted to enter the UK had the injustice not taken place. The judge thus concluded that if the appeal was not allowed this would legitimise the continuation of the historic injustice.

20. The judge, as required, had regard to section 117B of the 2002 Act (the reference to the Immigration Act 2014 is mistaken). The judge noted there was no independent evidence of the Appellant's proficiency in the English language, but noted that he would have been settled in the UK shortly after his father had been discharged, but for the injustice, and would by now be a fluent English speaker. The judge did not expressly find that the Appellant was not financially independent, but found he would not be a burden to the taxpayer as his father was able to support him [27].

21. In his omnibus conclusion the judge referred to the Appellant's emotional and financial dependence on his parents, which was *"real, effective and committed",* a continuation of family life maintained through visits and to the fact that the Appellant was not leading an independent life. Accordingly, the judge concluded that the ECO's decision was disproportionate and allowed the appeal on human rights grounds.

22. It is within this context that the judge's conclusion that family life was established between the Appellant and his parents is to be assessed.

23. The law has been stated in a number of cases and most recently in the decision of the Court of Appeal in Rai v ECO New Delhi [2017] EWCA Civ 320 which was decided after the decision of Judge Abebrese.

24. In the case of Rai (as cited) the Court of Appeal set out the legal principles relevant to determining whether there is family life engaged in appeals such as this from paragraph 17 onwards. It observed that in the case of Kugathas, Sedley LJ referred to dependency as *"real", "committed"* or *"effective"* support and that the Upper Tribunal had accepted in the case of Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC), that the judgement in Kugathas had been interpreted too restrictively in the past and that it ought to be read in the light of the subsequent decisions of the domestic and Strasbourg courts (see paragraph [18]).

25. At paragraph 19, the court cited Lord Dyson M.R who emphasised when giving the judgement of the court in Gurung (at paragraph 45), *"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."* In some instances, *"an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents."*

26. At paragraph 20 the court also cited the observations of Sir Stanley Burnton in Singh v SSHD [2015] EWCA Civ 630 at [24]:

    "24. I do not think that the judgement which I have referred leads to any difficulty in determining the correct approach to Article 8 cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life the purposes of Article 8. I point out that the approach of the European Commission of Human Rights cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life the purposes of Article 8."

27. Lord Justice Lindblom referred to the decision of the Upper Tribunal in Rai and observed that the single factor which seem to have weighed most heavily in the conclusion of the judge in that case was the Appellant's

parents' willingness to leave Nepal to settle in the United Kingdom when they did without focusing on the practical and financial realities entailed in that decision. At [39] the real issue under Article 8 (1) was whether, as a matter of fact, the Appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did (see [39]).

28. The court referred to the circumstances of the Appellant and his family and the fact that he and his parents would have applied at the same time for leave to enter the United Kingdom and would have come together as a family unit had they been able to afford to do so. The court considered that this was a factor that had not been taken into account when it should have been. Thus, the question of whether, even though the Appellant's parents had chosen to leave Nepal to settle in United Kingdom when they did, his family life with his parents subsisted then, and was still subsisting at the time of the Upper Tribunal's decision; this was *"the critical question under Article 8 (1)."*

29. The judge did not make any explicit reference to all the case law which set out the relevant principles relating to family life between parents and adult children although at [7] and [25] he did make reference to jurisprudence dealing with cases of adult children of Gurkhas. The question is whether those principles were properly applied to the evidence in the appeal as reflected in the findings of fact.

30. As the decision in Rai makes plain, the critical question is whether as a matter of fact, the Appellant demonstrated that he had family life with his parents which had existed at the time of their departure to settle in the UK and that it endured beyond it (see paragraphs [39] [42] of Rai). This is of significance because the ECO in her decision referred to the Appellant's parents choosing to apply for settlement and their decision to move to the UK in her assessment.

31. The judge's clear assessment of the facts was that the Appellant was part of the family unit until the time his parents decided to come to the United Kingdom and continued to be so. The judge accepted the Appellant's claim that he would have entered the UK with his parents had he been permitted to do so. The judge also found that the Appellant was financially and emotionally dependent on his parents. The evidence was that the Appellant parents made full financial provision for the Appellant's living costs and education.

32. The judge had referred to the cultural expectation upon which their family life had been premised in Nepal, and the continuing emotional support and dependency between the Appellant and his parents was also expressed in the evidence and witness statements, which the judge accepted, including evidence of regular and extended visits being made by both parents to provide the emotional support the Appellant was accustomed to as part of the family unit.

33. I am satisfied that the judge properly focussed on the question of family life and his approach to that question was entirely consistent with that set out in Gurung, where the Court of Appeal said at [45]: " *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*" and at [46] endorsed the guidance in Ghising. The judge had in mind the relevant question, namely, whether there existed emotional and other ties over and above the normal ties between adult family members and set out in his findings of facts his assessment of the evidence which was rationally open to him. While his findings could have been more detailed, I consider that the judge did apply the relevant principles and it was open to him on the evidence and considering the factual assessment that he made, to reach the conclusion that family life had been established between the Appellant and his parents (see [23]). The first ground therefore is not made out.

34. Dealing with the second and third ground advanced on behalf the Respondent, it is submitted that the judge failed to properly apply the provisions of section 117B of the 2002 Act and was wrong to dispose of the question of proportionality based on historic injustice.

35. Earlier in his decision the judge had referred in the proportionality assessment to the issue of *"historic injustice"* [25] and the weight attached to this as set out in the cases of Gurung. The judge's conclusions here are adequately reasoned. The Court acknowledged the importance of the issue of historic injustice and at paragraph 38 the court observed 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*".

36. At paragraph 42 the court held that "*If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child 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*".

37. In the decision of Ghising at paragraph 59 the Tribunal considered the issue of weight to be attached to the issue of historic injustice as follows:

    "59. That said, we accept Mr Jacobs'submission where article 8 is held to be engaged and the fact that but for the historic wrong the Appellant would have 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 was 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 BOC's:

"were prevented from settling in the UK. 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 settled in the UK has such a strong claim to have his article 8 (one) right indicated, notwithstanding the potency of the countervailing public interest in maintaining of a firm immigration policy." [41]

In other words, the historic injustice issue will carry significant weight, on the Appellant cited the balance, and is likely to outweigh the matters relied on by the Respondent, where these consist solely of the public interest just described."

38. At paragraph 60 the Tribunal went on to state;

"once this point is grasped, it can immediately be appreciated that they may be cases where Appellants in Gurkha cases will not succeed, even though their family life engages article 8 (one) and the evidence shows that they would 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, about immigration history and/or criminal behaviour may still be sufficient outweigh the powerful factors bearing on the Appellant side. They being an adult child 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."

39. By reason of his earlier findings, the judge reached the conclusion on the evidence that the Appellant could not meet the provisions of Annex K on account of the two-year criterion at [23]. It is plain from the decision that the judge did not make his findings in a vacuum, he was clearly alive to the issue, and I am not satisfied that he simply discounted this finding from his assessment of proportionality. The judge was entitled to attach significant weight to the historic injustice argument and concluded, having been satisfied on the evidence before him that, but for the historic wrong, the Appellant would have settled in the UK as a child, he found that this ordinarily would be sufficient to outweigh the public interest in maintaining immigration control.

40. In this appeal, the Respondent has not relied on any countervailing factor, such as poor immigration history or criminality that would have been capable of displacing that presumption. In any event, it is further plain that the judge went beyond the consideration of the historic injustice argument

at [28] and weighed into the balance those additional factors referred to therein. That he was entitled to do.

41. It is true that his consideration of section 117B of the 2002 Act, was in error of law. Mr Jaisri acknowledged that this was not conducted within the correct legal framework, but he submitted, in view of the significant weight attached to the historic injustice, such consideration would have made no material difference to the outcome of this appeal. I agree with that submission. The judge gave adequate and sustainable reasons for finding that there was family life and dependency between the parties and having reached conclusions in the affirmative to the first four questions in Razgar, went on to consider the issue of proportionality.

42. It has not been demonstrated by the Respondent that the two considerations identified by Mr Clarke; ability to speak English and financial independence, even if considered correctly, would have been of such great or significant weight to have outweighed the other issues identified by the judge in this appeal, namely the significant weight attached to the historic injustice argument and the other factors identified at [28]. I therefore find that even if the judge was in error by not properly applying the provisions of section 117B of the 2002 Act, it was not material in view of the matters set out above and does not justify the setting aside of the decision. The decision of the First-tier Tribunal shall stand; the appeal of the Respondent is dismissed.

Notice of Decision

The decision allowing the appeal made by the First-tier Tribunal shall stand; the Respondent's appeal shall be dismissed.

No anonymity direction is made.

Signed Date: 12/11/2017

Deputy Upper Tribunal Judge Bagral