Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00862/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2017	**On 04 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

NARAYANI THAPA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellant: Mr S Ahmed of Counsel, instructed by 12 Bridge Solicitors
For the Respondent: Mr N Bramble of the Specialist Appeals Team

DECISION AND REASONS

The Appellant

1. The Appellant is a subject of Nepal, born on 1 June 1987. On 21 April 2015 she applied for entry clearance for settlement as the dependant of her father, a former Gurkha soldier who was settled in the United Kingdom with his wife, the Appellant's mother, born 11 February 1946. The Appellant's father was honourably discharged 29 September 1968 and died on 3 August 2016 leaving his wife and four sons and four daughters, including the Appellant. Her parents entered the United Kingdom in January 2011. All of the children are living in Nepal.

2. At the time of her application, the Appellant, aged 27, was pursuing university studies in Kathmandu where she lived in rented accommodation. The evidence is that she has now completed her studies.

The Entry Clearance Officer's Decision

3. On 14 May 2015 the Respondent refused the application. He considered the Appellant was enjoying an independent life without difficulty. There was evidence of only one transfer of funds from her father on 7 April 2015. The Respondent accepted the Appellant's parents had visited Nepal subsequent to their settlement in the United Kingdom but commented the Appellant had provided no evidence of the visit or other contact with her father since 2011. The Appellant was not wholly financially and emotionally dependent on her father and so did not meet the requirements of, paras 9(5) and 15 of Annex K to the Immigration Rules. He also noted she had lived apart from her parents for more than two years and so could not satisfy the requirement of para 9(8) of Section 2A, at para 13.2 of chapter 15 of the Immigration Directorate's Instructions (the IDI).

4. The Respondent considered the claim by reference to Article 8 of the European Convention and having regard to the historic injustice done to Gurkha soldiers.

5. The Appellant's parents had sought settlement in the United Kingdom when the Appellant was an adult and in the knowledge that adult children did not automatically qualify for settlement in line with parents. The refusal of entry clearance did not disturb the Appellant's private and family life which she had had since 2011 when her parents left her to come to the United Kingdom. The Respondent concluded the decision to refuse entry clearance was proportionate to the legitimate public objective of protecting the economic well-being of the country.

Original Grounds of Appeal

6. On 8 June 2015 the Appellant through her solicitors lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are lengthy. Essentially, they argue that the Appellant is financially dependent on her parents and money has been sent through friends and acquaintances visiting Nepal as well as by wire transfer; has been studying full-time and not taken work. The Appellant remained emotionally dependent on her parents. Contact had been maintained by telephone and three visits over the previous three years. She is an unmarried young Nepalese woman who has continued to live life under her parents' protection who remain responsible for her until she married.

7. If the Appellant's father had been able to settle in the United Kingdom earlier, the Appellant would have come with him as his minor child. The Appellant met the requirements of the Immigration Rules and the IDI since but for the historic injustice she would already be settled in the United Kingdom. The Appellant's father had applied promptly after he had been in a position to do so following the announcement on 19 June 2009 extending the policy to include Gurkhas who had retired before 1 July 1997. On 20 September 2015 the Respondent's decision was reviewed by the Entry Clearance Manager. Effectively, he summarised the reasons for the original decision and found no reason to depart from it.

Proceedings in the First-tier Tribunal

8. By a decision promulgated on 24 February 2017 Judge of the First-tier Tribunal C M Phillips dismissed the appeal on all grounds. On 20 September 2017 Judge of the First-tier Tribunal Shimmin granted permission to appeal because it was arguable the Judge had not made an adequate assessment of the evidence, whether the Appellant had lived apart from her parents for more than two years and had failed to make any specific finding on this. Further, it was arguable she had erred in her application of the principles of law in relation to adult dependent children.

The Upper Tribunal Hearing

9. The Appellant's mother attended the hearing with her carer. Mr Ahmed explained that he had been able to speak to her and inform her of the nature and purpose of the Upper Tribunal hearing and was satisfied she had understood him. She confirmed her address but otherwise took no part in the proceedings.

Submissions for the Appellant

10. Mr Ahmed submitted the Judge had made material errors of law in her consideration of Annex K of the Immigration Rules and in her treatment of the claim under Article 8 of the European Convention. At para 39 of her decision the Judge had made findings on the extent of the Appellant's emotional and financial dependence on her parents, but had failed to deal with what the Appellant had said at para 11 of her statement of 2 February 2017 detailing how her father enabled her to meet her living expenses. Mr Ahmed submitted that the manner of financially supporting the Appellant met the requirements of para 15 of Annex K.

11. He referred to paras 36-37 and 46 of the Judge's decision. I noted these constitute findings of evidence of only one remittance, of a lack of evidence of contact between the Appellant and her parents and that the Appellant has been leading an independent life as a student in rented accommodation in Kathmandu. He then turned to para 51 of the decision and submitted that the Judge's findings about the financial dependence of the Appellant on her parents had not addressed para 11 of the Appellant's statement about the various ways her parents had sent her money. I noted that again para 51 referred to the lack of evidence of any financial dependence.

12. He went on to address the issue whether the Appellant had been living apart from her parents for more than 2 years. He referred to para 8 of her statement of 2 February 2017 which stated her parents had visited her for three months each year. He submitted this was sufficient to meet the requirement that the Appellant should not normally have lived apart from her father for more than two years unless the family unit was maintained albeit the Appellant lived away because she was studying and returned home during holidays. He noted para 19 of Annex K expressly provided that if that condition was not met the application must be refused under the policy.

13. He argued that it could not have been the purpose of the policy to prevent an adult child's successful application in a situation where her parents had previously left

Nepal to settle in the United Kingdom. The Judge had not considered the context of the family life of the Appellant with her parents in the context of the appropriate Nepali cultural background.

14. He referred to the judgment in *Rai v ECO – New Delhi [2017] EWCA Civ. 320*. The applicant in which was born in 1956 to a Gurkha discharged in 1971 and who had come to the United Kingdom in 2010. At the age of 26 the applicant had sought entry clearance.

15. He referred generically to paras 17, 18, 26, 27, 34 and 35 of the judgment in *Rai* by way of reference. He continued that at para 39 of her decision the Judge had made other findings favourable to the Appellant. He did not amplify this submission with which I find difficulty because para 39 states:-

> … the Appellant cannot properly be said to have been residing with the Sponsor or witness from 29 January 2011 when both left to settle in the United Kingdom. The fact that she is not yet married and is said to be unemployed and does not have children of her own is not in itself or with the evidence provided with the application, sufficient to justify a finding that there is the level of financial or emotional dependency for family life to have continued following the settlement of her parents in the United Kingdom. The evidence does not show that there are factors preventing this educated Appellant from finding work in Nepal and continuing to live there independently.

Mr Ahmed noted the Respondent had relied on paras 9(5) and 9(8) of Annex K and not para 9(9) which stated that an applicant should not have formed an independent family unit. He suggested that the findings in para 39 contaminated the Judge's findings about her living apart from her parents.

16. Turning to the claim under Article 8 of the European Convention, Mr Ahmed referred to para 55 of the Judge's decision. He submitted the Respondent had not relied on para 9(9) of Annex K; that the Judge's finding that the Appellant was living independently from her parents because her parents chose to migrate carried little weight in the light of the comments made at paras 35-38 of the judgment in *Rai*. The Judge had not considered the "practicalities" of the Appellant's circumstances. Although the Judge had set out part of the head note in *Ghising (Ghurkhas/BOCs: historic wrong: weight) [2013] UKUT 567 (IAC)* she had erred at para 33 of her decision in finding that Article 8 was not engaged because there was no family life. Mr Bramble properly accepted that the Judge's approach to the issue of family life at para 63 of her decision was confused. The issue was not so much whether there was family life but the materiality of family life. Mr Ahmed continued that the Judge's approach to the assessment under Article 8 was in the light of the jurisprudence in Gurkha cases in error.

Submissions for the Respondent

17. Mr Bramble submitted the Appellant had been living apart from her parents for more than two years. Their visits to Nepal for two or three months did not constitute living together. The Judge was entitled to find the Appellant lived an independent life.

18. The Judge had been entitled to come to the view at para 32 of her decision that the Appellant had not shown her late father had been in a position to or had supported her.

19. The jurisprudence in *Rai* was not relevant to the application of Annex K but to the assessment of a claim under Article 8 outside the Immigration Rules. The Judge had adequately considered paras 9(5) and 9(8) of Annex K. Her conclusion at para 55 about the Appellant's private and family life was sustainable on the evidence and he referred to paras 38 and 39 of the judgment in *Rai*.

20. The Judge was entitled to conclude the Appellant was leading an independent life. At para 47 of her decision she had taken account of the extent of the evidence of telephone contact.

Consideration

21. Permission to appeal was granted on three grounds:-

    (1) That arguably the Judge's assessment of the evidence whether the Appellant had lived apart from her Sponsor for more than two years is adequate, particularly in the light that she failed to make a specific finding on this.

    (2) That she arguably erred in applying the principles of law in relation to adult dependent children.

    (3) That her proportionality assessment arguably failed to adequately take account of the historic injustice issue.

22. By reason of Section 85(4) of the 2002 Act the Judge was entitled to take into account the fact the Appellant's father was deceased at the date of the hearing. Appendix K links policy to settlement of an adult child with a former Gurkha which for all intents and purposes means the child's father. Annex K was issued on 28 January 2015 and by a letter of 9 April 2015 from the Home Office Armed Forces Policy group to the Ghurkha Satyagrah which was before the Judge, it was made clear that there were no plans to extend the policy in Annex K to cover cases where the former Gurkha sponsor has died, explaining that this was because the policy was based on the applicant being dependent on the former Gurkha.

23. The Judge properly dealt with this issue at para 41 of her decision explaining why the Appellant could not meet the requirements of Annex K. The consequence is that any error which the Judge may have made in relation to her interpretation of any other aspect of Annex K cannot be a material error of law.

24. The Judge's finding that the Appellant had been living independently since either 2011 or 2013 is contained in para 38 of her decision and re-iterated at para 46.

25. The second ground upon which permission was granted related to the application of the principles of law relating to adult dependent children. The Judge did not address the requirements of para 317 of the Immigration Rules which require an adult child seeking entry clearance to be living alone and in the most exceptional compassionate

circumstances. The Judge's findings on the evidence at paras 39, 46 and 57-58 of her decision make it clear that there was no suggestion made to her or evidence before her that the Appellant was living in the most exceptional compassionate circumstances. Accordingly, the failure to make express reference to para 317 of the Immigration Rules cannot be a material error of law since the Appellant's appeal was doomed to failure if it relied on para 317.

26. The final ground for the grant of permission relates to the Judge's assessment of the proportionality of the Appellant's claim outside the Immigration Rules and outside the Respondent's published policies. The Judge heard the appeal before the Supreme Court handed down its judgment in *R (Agyarko) v SSHD [2017] UKSC 11* but promulgated her decision two days after the Supreme Court's judgment. She made no reference specifically to the judgments in *Agyarko* in either the Court of Appeal or the Supreme Court. This is not a material matter because at para 42 the Judge stated that in any event she was going to give the appeal a full consideration with regard to any claim under Article 8 of the European Convention. For the reasons already given, such a consideration had to be outside the Immigration Rules.

27. At para 60 of *Agyarko* the Supreme Court stated:-

> … the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. … the Secretary of State has defined the word "exceptional" as … as meaning "circumstances in which refusal would result in an unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate".

Previously, the Upper Tribunal in para 157 of *Ghising* had identified the critical issue to be whether an applicant can demonstrate that the difficulty he faced in gaining entry as a young adult was only because his father had, as a result of the historic injustice, not been able to gain entry into the UK sooner. In *The Queen (Gurung and Others) v SSHD [2013] EWCA Civ 8* at para 98 Dyson MR stated:-

> … the purpose of the policy as regards adult dependent children is clearly stated on the face of the policy itself and is far narrow than this. It draws a clear distinction between dependent children who are under 18 and those who are over that age. The purpose of the policy is not to facilitate the settlement in the UK of adult dependent children. The policy recognises that such children may be granted leave to enter under Rule 317(i)(f) and if Article 8 requires it. Otherwise, they are not granted leave to enter unless there are exceptional circumstances.

This still has some relevance in relation to Annex K issued on 22 January 2015 when assessing the proportionality of the Respondent's decision outside the Immigration Rules.

28. The Judge at para 55 found the Appellant had not discharged the burden of proof to show that Article 8 is engaged. This does not respect the structured approach to the decision making process for matters concerning Article 8 outside the Immigration Rules described in *R (Razgar) v SSHD [2004] UKHL 27*. The threshold for the

establishment of family life is low: see *VW (Uganda) v SSHD [2009] EWCA Civ.009.* The Judge erred in law in her approach to Article 8. The facts as found by the Judge clearly demonstrate that there is family life between the Appellant and her mother. The Respondent's decision is an interference with that family life. The question is whether the interference is sufficiently grave to engage the State's obligations under Article 8.

29. Given the acknowledgment of the historic injustice against the Gurkhas, I find that the State's obligations under Article 8 are engaged. The Respondent in the original decision of 14 May 2014 based the refusal on the need "to protect the rights and freedoms of others and the economic well-being of the country". There is no explanation what rights and freedoms of others would be infringed had the Respondent granted the Appellant entry clearance. The justification by reference to the economic well-being of the country follows for the Respondent from the findings made earlier in the decision that the Appellant does not meet the requirements of Annex K.

30. The difficulty which the Appellant faces is the lack of evidence on a number of matters. While it is clear that both her parents and she applied for entry clearance promptly after the Secretary of State's policies had been extended so as to include her parents in 2009 and the Appellant on 22 January 2015. However, there is no evidence that had her father been able to settle in the United Kingdom soon after his discharge from the army, he would have done so. I also note that there was no explanation whether and if so with what result any of her seven siblings had applied for entry clearance and there was no explanation for this omission.

31. There was a singular lack of evidence of financial support except for payment subsequent to the death of the Appellant's father. In particular, there was no evidence of the transfer to the Appellant in Kathmandu of her father's army pension referred to in para 11 of the Appellant's statement of 2 February 2017. There was no challenge to the Judge's findings at para 32 on the Appellant's parents' incomes.

32. There was no dispute that the Appellant's parents and latterly her mother had returned on visits to Nepal. But there was no evidence to show how they had spent the time of their visits. There was nothing to show that the bulk of the time had been spent with the Appellant, rather than seeing some or all of her other seven siblings.

33. The evidence about the emotional dependency of the Appellant and her mother amounted to the Appellant's assertion she is the only unmarried member of the family at paras 13 and 14 of her 2 February 2017 statement, repeated at para 3 of her unsigned statement filed on 23 November 2017. Her mother says in her statement of 2 February 2017 that the Appellant is her youngest daughter and her responsibility until she marries; that she is aged and suffers from various health problems and if the Appellant came to the United Kingdom she would be able to look after the Appellant and that they speak almost every day and that she, the mother, is lonely.

34. I keep in mind the fact of the historic injustice practised on the Gurkhas and the steps the Respondent has through her various policies attempted to address this. I have regard to the age and the claimed frailty of the Appellant's mother, noting that there

was no documentary medical evidence of this. Looking at matters in the round, I find that on the evidence before the Tribunal the Appellant has not shown the decision of the Respondent causes undue hardship to the Appellant or indeed her mother so as to make it disproportionate to the State's need to maintain proper immigration control, even taking into account the comments in *Ghising.* Consequently the appeal is dismissed.

Anonymity

35. There was no request for an anonymity direction and having heard the appeal I find none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained an error of law limited to the Judge's assessment of the proportionality of the Respondent's decision with regard to the Appellant's claim under Article 8 of the European Convention outside the Immigration Rules. The following decision is substituted:-

The appeal is dismissed on human rights grounds.

Anonymity direction not made.

Signed/Official Crest Date: 03. i. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal has been dismissed and no fee award may be made.
Signed/Official Crest Date: 03. i. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal