Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05945/2015**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 27 March 2018	**On 13 April 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SHARADA LIMBU

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr S Jaisri instructed by Sam Solicitors
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a citizen of Nepal who was born on 2 August 1985. On 31 July 2015, she applied for settlement in the United Kingdom with her father (the sponsor) who is a former Gurkha soldier. On 20 August 2015, the Entry Clearance Officer ("ECO") refused the appellant's application for entry clearance.

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 9 January 2017, Judge Geraint Jones QC dismissed the appellant's appeal.

3. The appellant sought permission to appeal to the Upper Tribunal which was initially refused by the First-tier Tribunal but on 20 September 2017

the Upper Tribunal (UTJ Plimmer) granted the appellant permission to appeal.

4. On 9 October 2017, the ECO filed a rule 24 response seeking to uphold the judge's decision.

The Judge's Decision

5. The judge had before him a substantial bundle of documents from the appellant running to 101 pages and he heard evidence from the sponsor (Mr Karna Limbu). The judge set out a "chronology of events" at para 4 of his determination and, having considered the evidence at paras 5-16, made a number of factual findings at para 17(i)-(viii).

6. None of the judge's findings were challenged before me.

7. The appellant's father (the sponsor) enlisted in the Brigade of Gurkhas on 18 October 1965. He was honourably discharged on 29 October 1980.

8. In 1968, the appellant's father married his first wife. They have six children, the appellant being the youngest born on 2 August 1985.

9. In September 1983, the sponsor married his second wife. She continues to live in Nepal and they have one son who was born on 24 December 1984.

10. In March 2010, the appellant's father together with his first wife and two sons were granted settlement in the UK under the 2009 Ministerial Policy relating to ex-Gurkha servicemen and their family members. They all remain in the UK and have indefinite leave to enter or remain.

11. The appellant remained in Nepal after her father and mother came to the UK in March 2010. It appears that she attended school in Nepal and between 2011 and 2014 undertook a degree in Humanities and Social Sciences at the Mahendra Multiple Campus in Dharan under the auspices of Tribhuvan University.

12. The appellant has, throughout, been financially supported by her father in the UK from his army pension.

13. The appellant applied for entry clearance to join her father in the UK on 31 July 2015. This was, therefore, shortly before her 30th birthday.

14. At para 17 of his determination, Judge Jones QC made the following findings of fact:

> "17. On the basis of the totality of the relevant evidence and those documents to which I have been referred. I make the following findings of fact:
>
> (i) I accept Mr Limbu's evidence concerning his military career, the facts that he sets out about his first and second marriages and the details that gives about the number of children that he has and their present respective locations.

(ii) I find that the appellant is a young, healthy adult female who has lived in Nepal in rented accommodation since her father chose to relocate to the United Kingdom in 2010. I find that the appellant has lived independently as his only to be expected of a young mature adult. I find that the appellant has no physical or mental disabilities that require her to have any particular level of care. She is entirely self-caring unable to live a normal adult independent life.

(iii) I find that the appellant's father supports her financially by way of making his army pension available for her use and benefit. I find that that would continue. If and for so long as necessary, whilst the appellant continues to reside in Nepal if she does not have the means to support herself.

(iv) I find that there is no good reason why the appellant should not enter the local employment market armed with such academic qualifications as she has been able to accrue. I appreciate that it might not be easy for the appellant to obtain employment of the type that she would prefer to have but, equally, that obtains as much in this country as it might in any other"

(v) I find that there is no emotional dependence between the appellant and her father over and above that which is normal between a parent and adult child. I specifically reject the evidence of both the appellant and her father in so far as it is intended to convey anything over and above emotional ties that are usual between parents and an adult child. I specifically reject the unreasoned assertions that there is emotional "dependence". If there was "dependence" and certainly dependence to the extent that anybody thought that the appellant's well-being would be harmed if the appropriate emotional support was not available to her, then it is utterly surprising that her father should have chosen to relocate this country in 2010, leaving his adult daughter in Nepal. I also note that he has made only one visit to her in Nepal, although I acknowledge that that might be as a result of financial constraints. It is common in Nepalese cases to find an assertion that it is culturally the norm for children to be reliant upon their parents until they get married. That should not be confused with the proposition that the level of emotional involvement between parent and adult child amounts to emotional dependence. I reject any such notion.

(vi) I find that the appellant is not in full time education. I accept that she may be re-sitting some examinations relating to the degree course that she undertook 2011 – 2014 but the very fact that she is re-sitting examinations either indicates a lack of academic ability or a lack of application to her studies was perhaps the appellant was pursuing other interests during the years when she should have been applying herself to successfully completing her degree course. I accept that she was in full-time education 2011 – 2014 as that is supported by the document dated 23 March 2015 at page 43. That document, which comes from the Mahendra Campus, ends with the paragraph "I know nothing against a moral character and wish her a bright future". That reads as good wishes for the future to somebody who is leaving or has just left the university.

(vii) I am entirely satisfied that the appellant has been living in her single person independent household in Nepal since 2010. I find that the father has been living in a separate household, as a matter of choice and not arising from any established necessity.

(viii) I find that there is a very modest degree of family life between father and daughter, based upon little more than the usual communication between family members and the fact that the appellant receives financial support, at least for the time being, from her father. That is the character and extent of that very modest family life"

15. Judge Jones QC then went on to consider whether the appellant could succeed under the relevant policy in respect of ex-Gurkha servicemen and their families (Annex K) at paras 18-24. He concluded that she could not meet the requirements of that policy, in particular because she had formed "an independent family unit" in Nepal since her father had settled in the UK in 2010.

16. Importantly for the purposes of this appeal, the judge then went on in paras 25-30 to consider whether the appellant could nevertheless succeed under Art 8 of the ECHR. Whilst he accepted that the appellant had established, what he described as "very modest family life" with her father, he nevertheless concluded that any interference would be proportionate. The judge said this:

"25. I turn to article 8 ECHR. The starting point is my finding that there is very modest family life between the appellant and her father characterised by continued contact through electronic means and one visit by the appellant's father. I put the matter in that way because I am in no doubt that the appellant's father's family home is in the United Kingdom.

26. If the United Kingdom refuses to allow the appellant to settle in this country there will be no interference with the nature and extent of the very modest family life which I have found to exist. It will simply continue or, at least, will be able to continue if the various parties wish it to do so. Article 8 is not a choice of country of residence provision and should not be treated as such.

27. When I look at paragraph 42 in the judgement of the Court of Appeal in R (Gurung) v Home Secretary [2013] 1 WLR 2546 it has to be seen against the factual findings in that case. Mr Yqsim's position is that once I have made a finding that there is any degree of family life between the appellant and his parents then it must follow from the dictum of the Master of the Rolls at paragraph 42 in the Gurung judgement that this appeal must be allowed. He puts it on the basis that section 117B(1) of the Nationality, Immigration and Asylum Act 2002, which provides that effective immigration control is in the public interest, does not negate the opinion of the Upper Tribunal that in an historic wrongs case, there should be something over and above the expedient of firm and fair immigration control to weight the proportionality balance against an appellant, such as this appellant. The dictum to which I have referred is not a proposition of law, any more than the dictum of the Upper Tribunal about the weight to be given to family life in an historic injustice case when the proportionality exercise is undertaken within article 8(2). It is trite law that the proportionality exercise must be undertaken at the date of this appeal and not on some hypothetical basis relating to some earlier date. That is why the nature and extent of the actual family life is an important factor to be determined before the proportionality balancing exercise can be undertaken.

28. It would be wholly artificial and in my judgement a rather obvious error of law to proceed on the basis that just because the appellant might have been able to settle in this country many years ago, but for an identified historic wrong towards her father, that automatically translates into it being disproportionate to deny her settlement now (and it is now that we are concerned with), in circumstances where there could and would be no prejudice to the nature and extent of the family life presently enjoyed between the adult appellant and her father. I put the matter in that way because there is no duty on the United Kingdom to enhance the presently existing very modest family life between the appellant and her father. The dictum of the Upper Tribunal suggests otherwise and, to the extent that it does, it is incompatible with well-established jurisprudence to the contrary. Emotional responses to hard facts cannot be allowed to alter the essential principles applicable in an article 8 appeal where the Razgar approach is to be applied as at the date of this appeal.

29. The proportionality exercise has to take place against the findings of fact that I have made concerning the nature and quality of the family life presently enjoyed. There is no duty under article 8 for the United Kingdom to enhance or improve the quality of family life that became established after the appellant's father chose to relocate to this country. As I have found, that degree of family life will not be prejudiced or in any way diminished if this appellant is not permitted to settle in the United Kingdom. Article 8 has no compensatory principle within it, and it is not designed to be used (and should not be used) as a vehicle to provide perceived compensation or recompense to somebody whose father met with an historic wrong.

30. Thus on the basis that the very modest degree of family life that has existed between the appellant and her father, which has existed for several years since his decision to relocate to this country, will not be prejudiced or diminished by the appellant not being able to take up residence in this country, I find that denying her settlement will not and cannot amount to a breach of her and/or her father's right to a family life. For the reasons which I have given above, even if I was wrong in that conclusion, I do not regard the historic wrong done to the appellant's father to be a trump cards so far as proportionality is concerned and on the facts of this case I do not consider it disproportionate for the United Kingdom to deny settlement to an appellant who, as I have found above, cannot bring herself within the generous provisions of Annex K."

The Appellant's Challenge

17. On behalf of the appellant, Mr Jaisri submitted that the judge had erred in law in applying Art 8 of the ECHR. He submitted that, having found that there was "very modest family life" between the appellant and sponsor, the judge had failed to give proper weight to the "historic injustice" perpetrated against ex-Gurkha servicemen and their family members. He submitted that, applying the Upper Tribunal's decision in Ghising and Others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 567 (IAC), in the absence of a bad immigration history or criminal behaviour, of which there was none in this case, the historic wrong should be accorded significant weight and would ordinarily determine the outcome of the Art 8 proportionality assessment. Mr Jaisri submitted that in paras 27-30, the judge had failed to give the 'historic wrong' the required weight. He

submitted that was a material error of law and invited me to remake the decision allowing the appellant's appeal under Art 8.

18. On behalf of the ECO, Mr Richards accepted that there was a material error of law in the judge's approach to the weight to be given to the "historic injustice" perpetrated against the appellant through her father, an ex-Gurkha serviceman.

19. He also invited me to remake the decision and made no submissions seeking to uphold the ECO's decision to refuse entry clearance.

Discussion

20. It was common ground that an "historic injustice" had been perpetrated against the appellant's father and through him the appellant herself. Had the government's policy properly reflected an opportunity for ex-Gurkha servicemen to settle in the UK with their dependent families when the appellant's father was discharged in October 1980 from the Brigade of Gurkhas, I accept that both he and his family (including the appellant) would have settled in the UK. Of course, the sponsor, the appellant's mother and her two older brothers did settle in the UK in March 2010 pursuant to the policy that came into effect in 2009. This was, of course, a time when the appellant was still at school and shortly after, between 2011 and 2014, went to university. Although Judge Jones QC made no specific finding that the appellant would have accompanied her father and family to the UK if the policy had been enforced earlier, that was clearly the evidence of the sponsor set out at para 25 of his witness statement as follows:

> "25. It has always been my intention to settle in the United Kingdom. However, I was not allowed to apply for settlement until 2009 after my daughter turned 18. Ex-Gurkhas who retired after 1997 were allowed to apply for settlement as early as 2006. If I had the opportunity to apply for settlement for my daughter before 2009, I would have applied to settle before my daughter had turned 18, but this opportunity was denied to me. I was not allowed to apply to settle in the United Kingdom until 2009. If I had the chance to settle earlier, then I would have taken the opportunity and settled in the United Kingdom with my family. I dedicated my life to serving the United Kingdom. I fought for the British people, as it was my duty. I am proud of what I did. We were appreciated by the British government for our service but were not allowed to settle in the United Kingdom. If the Home Office allowed us to settle immediately after I retired from the Army, then my daughter Sharada would have been able to settle in the United Kingdom sooner."

21. Judge Jones QC did not call into question the truthfulness of the appellant's father and it was not suggested before me that I should not accept what the appellant's father says in para 25 about the family's settlement in the UK if the policy had been in force earlier.

22. There was, therefore, a "historic wrong" perpetrated upon the appellant's father and through him the appellant herself. Judge Jones QC accepted that and he was right to do so. However, in paras 27-30, which I set out above, he gave little or any weight to this "historic injustice". At para 27, he appears to call into question what was said by the Upper Tribunal in the Ghising and Others case. There, the Upper Tribunal (UTJ Peter Lane (as he then was) and UTJ Deborah Taylor) made plan that the "historic injustice" should be given "substantial weight" (see [56]). That followed from the Court of Appeal's decision in Gurung and Others v SSHD [2013] EWCA Civ 8. At [59], the Upper Tribunal continued:

> "…[we] accept [Counsel for the appellant] submission that where Art 8 is held to be engaged and the fact that but for 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 determinate in an appellant's favour … We consider, [it] 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. … 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 upon by the respondent, where these consist solely of the public interest just described."

23. The reference to the "public interest just described" is to "maintaining of a firm immigration policy". The Upper Tribunal noted at [60] that:

> "… 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 very 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 given to the historic injustice will not normally require a decision in the appellant's favour."

24. In this appeal, although Judge Jones QC did not find any "emotional dependency" between the appellant and her father (see para 17(v) above), he did accept that "family life" existed between them albeit of a "very modest degree". There were no countervailing public interest factors of the kind acknowledged by the Upper Tribunal in Ghising and Others to outweigh the "historic injustice" which would have left the appellant settled in the UK sometime after her father was discharged from the Brigade of Gurkhas in 1980 if a lawful policy relating to the settlement of ex-Gurkha servicemen and their families had been in effect at that time. The appellant was born in August 1985 and would, therefore, either have been born in the UK or would, in my judgment, clearly on the evidence (which is uncontested) have come to the UK to settle with her father and family. The judge failed to give proper or any weight to that "historic injustice" as required by Ghising and Others. The judge was correct to say that it did not amount to a "trump card" but as the Upper Tribunal made plain it must be given "substantial weight" and, in the absence of countervailing public interest consideration going beyond the "maintenance of a firm immigration policy" such as a bad immigration history or criminality, it is likely to lead to a decision in an appellant's

favour because the public interest is of limited weight in those circumstances.

25. For these reasons, I am satisfied that the judge materially erred in law in his approach to Art 8 and his decision to dismiss the appellant's appeal under Art 8.

26. As I have already indicated, Mr Richards, on behalf of the ECO, did not seek to make any submissions inviting me to dismiss the appeal. I remake the decision allowing the appeal under Art 8 for the following reasons.

27. First, as Judge Jones QC found, there is family life existing between the appellant and her father, albeit of a "very modest" nature. I accept that she continues to be financially dependent upon her father although, since he came to the UK in 2010, she has been living independently of her father, at school, university and subsequently.

28. Secondly, I accept that the ECO's decision interferes with her family life to the extent that it prevents her living with her father and, indeed, separating her from her family in the UK.

29. Thirdly, I accept that there has been a "historic wrong" perpetrated against the appellant's father and through him the appellant herself. I accept that she would either have been born in the UK or would have settled with him in the UK as a child following his discharge from the Brigade of Gurkhas in 1980 if a lawful policy of settlement had been in place. That historic wrong is entitled to be given "substantial weight" and have a significant impact upon the proportionality balancing exercise. There is nothing in the evidence, and it was not suggested before me to be otherwise, of bad immigration history or criminal behaviour. The only relevant public interest is that of "maintaining a firm immigration policy" under s.117B(1) of the Nationality, Immigration and Asylum Act 2002. Whilst I recognise that the appellant is now 32 years of age. She is an adult and has completed, or nearly completed, her education. Nevertheless, there is nothing in the evidence, in my judgment, to outweigh the "historic wrong" perpetrated against her through her father. As the Upper Tribunal noted in Ghising and Others, in such circumstances the "historic injustice" would be "an important factor" carrying "significant weight" such that it was "likely to outweigh" the public interest in a firm immigration policy.

30. In my judgment, the historic wrong does outweigh the public interest in this case such that the appellant's continued exclusion from the UK to settle with her father and family is a breach of Art 8 of the ECHR.

Decision

31. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. I set that decision aside.

32. I remake the decision allowing the appellant's appeal under Art 8 of the ECHR.

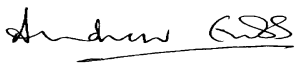
Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

This was a case where, in my judgment, the appellant's appeal should have been allowed and it is appropriate to make a fee award for the full fee paid or payable.

Signed



A Grubb
Judge of the Upper Tribunal

11 April 2018