Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/12380/2015**
HU/12382/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th January 2018	**On 14th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) BHIM DEVI GURUNG
(2) BEJU GURUNG
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Rai (Counsel)
For the Respondent: Ms A Everett (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Housego, promulgated on 3rd May 2017, following a hearing at Hatton Cross on 25th April 2017. In the determination, the judge dismissed the appeals of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are citizens of Nepal, and sister and brother respectively, who were born on 25th November 1984 and on 17th November 1985. They appealed against the decision of the Respondent Entry Clearance Officer, dated 3rd November 2015 refusing their application for leave to enter the UK in order to join their father, a former Gurkha soldier in the British Army. He had been in the brigade of Gurkhas on 12th November 1974 and had been discharged from the British Army on 10th January 1994. He was granted settlement in the UK on 7th March 2005, and arrived in this country on 21st June 2006. The reason given in the refusal decision of 3rd November 2015 is that the Appellants were said not to have a family life with their sponsoring father. It was said that they had lived apart from their Sponsor for more than two years and so did not meet the requirements of paragraph 9(8) of Annex K to the IDI on HM Forces resettlement.

The Findings of the Judge

3. The judge found that the Appellants remained in Nepal when their father came to the UK in 2005. It was only ten years thereafter that they wished to join him. Their mother and elder sister were already in this country. Both Appellants were a month short of 29 and 30 years of age when they applied to join their father. Given the well-known case law on "historical injustice", the judge held that the jurisprudence on historical injustice only applies when considering whether there is justification for interference with Article 8 rights to a family life. It does not apply when considering whether there is family life or not. These Appellants were both approaching 30 when the applications were made (see paragraph 36). The judge held that the Appellants do not meet the requirements of Annex K by reason of being apart from the Sponsor for over two years. The discretion exercised by the ECO informing the view that there was no emotional or financial dependence within Annex K was not a matter to be challenged in this appeal. A feature of this appeal was that the Appellants were declining job offers in Kathmandu. The judge held that they were clearly able to live independent lives. The sponsoring father had only made three visits to Nepal in the last ten years. The Appellants also wished to marry other Gurungs, but to have the approval of their father, before doing so. The judge held that there was no reason provided as to why there were no Gurungs in Nepal suitable for the Appellants to marry. It was held that, "There must be many more suitable pretentious spouses in Pokhara than in Aldershot, where the parents of the Appellants live" (paragraph 37).

4. One aspect of the judge's reasoning was precisely on the question of the Appellants wishing to marry and to set up their own independent lives. The judge held that if there was family life had in Article 8, it must be proportionate to interfere with that family life when the Appellants actually wish to end that family life with their parents. They had wished to do so as soon as possible when marrying out of the family. This, the judge held,

was a "factor that would outweigh the historical injustice in the proportionality assessment" (paragraph 41).

5. The appeals were dismissed.

Grounds of Application

6. The grounds of application state that the judge erred in finding that the Appellants did not meet the requirements of Annex K of the IDI of 5th January 2015. The judge was drawn moreover in his assessment of family life between the Appellant and the Sponsor.

7. On 6th December 2017 permission to appeal was granted by the Tribunal on the basis that it was arguable that the judge erred in finding the time living away from the Sponsor by the student Appellants meant that they could not meet Annex K. It was also argued that the judge attached too little weight to the "historic injustice" suffered by Gurkha families in his proportionality assessment.

Submissions

8. At the hearing before me on 26th January 2018, the Appellant was represented by Mr Rai of Counsel and the Respondent was represented by Ms Everett, a Senior Home Office Presenting Officer. In his submissions, Mr Rai stated that the judge below had erred for the following four reasons. First, at paragraph 39, the judge states that the Appellants do not meet the requirements of Annex K because they had lived apart from their parents for more than two years. The reasons for this conclusion is given at paragraph 31 where it is stated that because the applications postdated 1st April 2015 the Appellants had limited appeal rights. However, HC 194 came into force on 9th July 2012. GEN 1.1 of Appendix FM states that the intention behind the new Rules was to codify the Strasbourg case on Article 8 rights in this area. Article 8 claims can be made under different paragraphs of Appendix FM of the Immigration Rules. If an application is made under EC-DR.1.1 of the Immigration Rules as adult dependent relatives, of a person or persons settled in the UK, such an application would be considered as a human rights claim. The Appellants made an application under Annex K of Chapter 15, Section 2A of the IDI, which allows them to apply for settlement in the UK with their parents. Second, the judge had stated that the Appellants lived away from their father for more than two years. However, this ignores the fact that the Appellants were forced to live apart because of the Secretary of State's discretionary policy. The Appellants' father was not allowed to settle in the UK at the end of his military service. This was the entire background to these Gurkha cases, and hence the reference to the "historic injustice" doctrine in these cases. Had the Appellants' father been allowed to settle in the UK at the end of his military service the Appellants would have been able to settle in the UK as his children. By the time that the Appellants' father was granted settlement in this country the Appellants were over the age of 18 and it was not until 5th January 2015 that the Secretary of State published her policy to allow adult dependent

children to apply for settlement. Accordingly, it could not be said that the Appellants had lived apart from their parents for more than two years as if this was a mandatory requirement. While the Appellants had lived away from their father for more than two years they were students in Nepal. They lived in property owned by their father. They were living with their grandmother, and this was clearly family property and a family life unit. Fourth, with respect to financial and emotional dependency, the judge accepts (at paragraph 36) that the Appellants were being supported and maintained by the sponsoring father. The Appellants were living with their elderly grandmother in the family home. This was owned by their father. In addition, he was making visits with the Appellants' mother. There was frequent contact between them. The family unit was being maintained at their family home in Pokhara where they lived with their elderly grandmother. This was a case until she passed away. It cannot be said that the Appellants were not emotionally or financially dependent upon the sponsoring father.

9. For her part, Ms Everett submitted that the doctrine of "historic injustice" goes to the proportionality of the decision. The judge did not err in relation to his findings of fact. However, Ms Everett conceded that, "I accept that the judge's decision in relation to Annex K is at best not helpful". Nevertheless, the judge did leave himself alive to the issues before him. The fact that family life had been disrupted by the "historic injustice" did not help in identifying whether or not there was family life in the first place. The reasons given by the judge were not perverse. However, she ended her submissions by stating that, "But I do accept that the findings are relatively brief on the key issues".

10. In his reply, Mr Rai submitted that the judge did not read Annex K properly at all. Moreover, in relation to family life, the recent judgment in **Rai [2017] EWCA Civ 320**, saw Lindblom LJ state that an emphasis on the sponsoring father having chosen to settle in the UK in the Gurkha "historic injustice" cases was misconceived. To focus on settlement in the UK was

> "Not to confront the real issue under Article 8(1) in this case, which 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 the departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did" (see paragraph 39).

Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

12. First, as Ms Everett conceded the judge's determination in relation to Annex K "is at best not helpful" and there are findings which are "relatively brief on key issues". For the avoidance of doubt, paragraph 19

of Annex K is headed "living apart" and states that the applicant must not normally have lived apart from the Gurkha Sponsor for more than two years at the date of the application. However, it then goes on to state in the same breath, "Unless the family unit was maintained albeit the applicant lived away, for example time spent at boarding school, college or university as part of their full-time education …". This is precisely the position in which the Appellants find themselves. They were full-time students.

13. Second, the question then is whether a family life was indeed maintained, despite the fact that the Appellants had been living apart for two years from their sponsoring father. It is plain that it was. They were living with their grandmother in the family home, which was maintained by their sponsoring father. The judge had accepted (at paragraph 36) that they were supported and maintained by their sponsoring father. They were also emotionally dependent upon him in that he made periodic visits to them with the Appellants' mother to a family home in Pokhara.

14. Third, the judge failed to take into account the latest case law in **Rai [2017] EWCA Civ 320** where Lindblom LJ considered significant the fact that 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 the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did" (paragraph 39). This is the essence of the "historic injustice" remedy because it shows that even though there is a separation, which would not have occurred if the sponsoring Gurkha father had been allowed to settle in the UK earlier, the Appellants would also have settled earlier with the father and would have stayed together as a family unit. This was expressly recognised by Lindblom LJ in **Rai** who observed that "His parents would have applied upon the father's discharge from the army had that been possible:". His lordship went on to say that "The stark choice they had to make was either to remain with the Appellant … or to take up their long withheld entitlement to settle in the United Kingdom" (paragraph 41). In that case also the Court of Appeal was critical of the fact that

> "Those circumstances of the Appellant and his family, all of them uncontentious, and including – perhaps crucially – 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 to the United Kingdom together as a family unit had they been able to afford to do so, do not appear to have been grappled with by the Upper Tribunal Judge under Article 8(1). In my view they should have been" (see paragraph 42).

15. In this appeal, Judge Housego, simply stopped short at a superficial reading of Annex K observing that, "The Appellants do not meet Annex K by reason of being apart from the Sponsor over two years" (paragraph 39). This overlooks the fact that Annex K at paragraph 19 goes on to state that, "Unless the family unit was maintained or indeed the applicant lived away, for example by time spent at boarding school, college or university …". That was the position here. Second, it is also difficult to understand

the reasoning that, just because the parties wish to marry because "they so state" that this is "a factor that would outweigh the historical injustice in the proportionality assessment" because "the Appellants actively wish to end that family life with their parents" (see paragraph 41). Whatever they may wish to do or not to do, in circumstances where getting married is not an unusual course of conduct for most people in life, the fact was that at the relevant time in question the Appellants enjoyed family life with their sponsoring father, because they had not started leading independent lives, by stopping their studies, taking employment, and moving away from the family home. The conclusion arrived at (at paragraph 41) is therefore irrational.

Remaking the Decision

16. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the regional judge. I remake the decision as follows. This appeal is allowed.

18. No anonymity direction is made.

19. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 12th March 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a whole fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 12th March 2018