Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/27095/2016**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 16 March 2018 **On 21 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SANTOSHI TAMANG
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – New Delhi

Respondent

Representation:
For the Appellant: Ms A Nnamani (counsel) instructed by Howe & Co, solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Farrelly promulgated on 18 September 2017,

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which dismissed the Appellant's appeal against the respondent's refusal to grant entry clearance to settle in the UK as the dependent daughter of a former Gurkha soldier.

Background

3. The Appellant was born on 02 April 1986 and is a national of Nepal. On 4 October 2016 the appellant applied for entry clearance to settle in the UK as the dependent daughter of a former Gurkha soldier. On 18 November 2016 the Secretary of State refused the Appellant's application. The appellant's father was born on 26 February 1944. He served in the Gurkhas from 2 January 1962 until 31 August 1971. On 16 March 2011 he and his wife (the appellant's mother) were granted entry clearance so that they could settle in the UK. The appellant's father entered the UK on 3 March 2011. Her mother entered the UK on 5 November 2011. Her parents have lived together in the UK since then.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Farrelly ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 24 January 2018 Judge Hollingworth granted permission to appeal, stating

> "It is arguable that the Judge has fallen into error by intermixing a consideration of whether the elements required for family life had been established with those factors relating to the capability of the appellant to lead an independent life. At paragraph 24 of the decision the Judge referred to the appellant being an adult who can develop her own life. The Judge has not found that the appellant has so developed her own life in such a way that family life has been excluded between the appellant and her parents given the period of time which has elapsed. The Judge has referred to the question being whether family life exists within the meaning of article 8. The Judge referred to the appellant's older siblings clearly forming a life of their own with their respective partners. The appellant was unmarried. The Judge had no doubt the appellant has a close attachment with her parents. It is arguable that the Judge has attached undue weight to the fact of physical separation between the appellant and her parents for over six years. At paragraph 23 the Judge has stated within the normal course of events the appellant would, like her siblings, form her own independent family life. The Judge's conclusion that although the appellant was not married was that the appellant now has her own independent life. The essence of the case on behalf of the appellant in this context was that the appellant was unemployed and needed financial support for her essential needs. The Judge was not satisfied that the appellant could not economically sustain herself. It is arguable that the economic

capacity of the appellant as at the date of the hearing before the Judge detracts from the matrix of factors relating to economic dependency advanced on behalf of the appellant. It is arguable that the Judge has fallen into error in not setting out more extensively reasons for rejecting the evidence of financial dependency which had been advanced. It is arguable that the Judge has not attached sufficient weight to the factors bearing upon the appellant and her parents being separated in the light of the history of refusal. It is arguable that the Judge has attached insufficient weight to the visits made by the appellant's parents. It is arguable that the Judge should have embarked upon a proportionality exercise given the cumulative weight of factors arguably present on the basis of the available evidence in relation to the establishment of family life."

The hearing

6. (a) Ms Nnamani, for the appellant, moved the grounds of appeal. She told me that the grounds of appeal can be grouped under two headings. The first is whether the Judge made an error in considering whether or not family life exists for the appellant with her parents. The second ground of appeal is whether the Judge adequately explained why he did not accept that the appellant remains financially dependent upon her parents.

(b) Ms Nnamani explained that the factual background in this case is that the appellant is an unmarried adult who lived with her parents and siblings and Nepal. Her three younger siblings have remained in the UK and have been granted indefinite leave to remain so that they can live with their parents in the UK. One of her sisters in the UK is married and has a family of her own. Ms Nnamani told me that the appellant's parents delayed coming to the UK because they did not want to leave the appellant behind in Nepal. She reminded me that the appellant has made previous applications and that in 2016 she unsuccessfully appealed a refusal of entry clearance.

(c) Ms Nnamani took me to [20] of the decision where the Judge finds that the appellant has financial support from her parents. She told me that the Judge's error, found between [20] and [24] of the decision, is that the Judge finds that the appellant is capable of developing independent life in the future. She told me that the Judge's error is that he makes findings which are prospective rather than findings which focus on the facts at the date of the decision. Ms Nnamani told me that a number of the Judges findings suggest article 8 family life exists between the appellant and her parents and also the appellant and her siblings in the UK

(d) Ms Nnamani told me that the Judge finds that there was no intention that the parents and the appellant should separate, and that they lived together in Nepal; the appellant intended to come to the UK with her parents; that the appellant is unmarried and financially

dependent on parents; and that the appellant was in full-time education. Ms Nnamani then referred me to Rai v ECO [2017] EWCA Civ 320; Ghising (family life – adults - Gurkha policy) Nepal [2012] UKUT 160; R (Gurung) v SSHD [2013] 1 WLR 289; and PT (Sri Lanka) v ECO [206] EWCA Civ 612. She told me that, on the facts as the Judge found them to be, article 8 family life exists for this appellant - so that the Judge's conclusion is wrong in law.

(e) Ms Nnamani told me that the Judge's findings in relation to financial dependency are inadequate. She told me that the Judge does not adequately explain why he finds that the appellant's parents only make a contribution to her finances rather than finding that the appellant is financially dependent upon her father. She urged me to set the decision aside and to remit this case to the First-tier Tribunal to be heard of new.

7.(a) For the respondent, Mr Clarke took me through the same case law and told me that the Judge's decision is well within the range of reasonable decisions available to the Judge. Mr Clarke took me to the decision in the appellant's earlier appeal, promulgated on 31 May 2016. He told me that the decision contains a finding that there was no financial dependency between the appellant and her parents between 2011 and 2015. That 2016 decision also has a finding (at [49]) the article 8 ECHR is not engaged in respect of either family or private life. He told me that that must be the Judge's starting position.

(b) Mr Clarke told me that the Judge's findings are entirely in line with the caselaw relied on by both parties to this appeal (in relation to whether or not article 8 family life can exist between adult family members). He told me that at [23] the Judge clearly finds that article 8 family life does not exist for this appellant with her parents, and that that finding is entirely consistent with the established jurisprudence. He told me that the finding comes from a flawless assessment of the facts in this case. In reality, he said, there is no new evidence to displace the findings in the decision promulgated on 2016.

(c) Mr Clarke urged me to dismiss the appeal and to allow the decision to stand.

Analysis

8. Between [1] and [5] of the decision the Judge sets out the background to this case. Between [12] and [19] the Judge discusses the relevant law. The Judge's findings of fact are found between [20] and [24].

9. In a succinct and focused decision, the Judge finds that family life does not exist between the appellant and her parents. The Judge finds

that there are natural bonds of love and affection between the appellant and her parents. The Judge finds that the appellant's parents have limited funds but still send money to the appellant and are in regular telephone contact. The Judge finds that the appellant's parents are concerned about the appellant's well-being. The Judge confirms (at [22]) that he has evidence about the importance of family life and respect for elders in Nepalese society. The Judge finds that the appellant is unmarried and has a close attachment to her parents.

10. It is at least implicit in the Judge's findings that the appellant lived with her parents before her parents came to the UK. At [21] the Judge finds that the appellant and her parents were driven apart (so that their separation is not voluntary). At [22] the Judge finds that the appellant's older siblings have remained in Nepal and have developed their own independent lives with their respective partners, but draws a distinction between them and the appellant because the appellant is still unmarried.

11. Having made those findings, which form the component parts of article 8 family life, the Judge says that the appellant can, like her older siblings, form her own independent family life. Despite reaching findings which point towards the existence of article 8 family life, at [23] the Judge says that he is not satisfied that the appellant is financially dependent upon her parents & at [24] the Judge finds that there is no emotional dependency between the appellant and her parents, distinguishing emotional dependency from the natural bonds of love and affection.

12. Although the Judge writes his decision with manifest sensitivity, his findings are incomplete. The majority of the Judge's findings are findings which point towards the existence of article 8 family life, notwithstanding the appellant's date of birth. The Judge's findings at [23] and [24] are that in the future the appellant can establish independence. The Judge does not reach a conclusion about the appellant's facts and circumstances at the date of hearing. The Judge does not address the question of historic injustice. The Judge does not adequately explain why he finds that the appellant is neither emotionally nor financially dependent on her father.

13. In Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) it was held that (i) In finding that the weight to be accorded to the historic wrong in Ghurkha ex-servicemen cases was not to be regarded as less than that to be accorded the historic wrong suffered by British Overseas citizens, the Court of Appeal in Gurung and others [2013] EWCA Civ 8 did not hold that, in either Gurkha or BOC cases, the effect of the historic wrong is to reverse or otherwise alter the burden of proof that applies in Article 8 proportionality assessments; (ii) When an Appellant has shown that

there is family/private life and the decision made by the Respondent amounts to an interference with it, the burden lies with the Respondent to show that a decision to remove is proportionate (although Appellants will, in practice, bear the responsibility of adducing evidence that lies within their remit and about which the Respondent may be unaware); (iii) What concerned the Court in Gurung and others was not the burden of proof but, rather, the issue of weight in a proportionality assessment. The Court held that, as in the case of BOCs, the historic wrong suffered by Gurkha ex-servicemen should be given substantial weight; (iv) Accordingly, 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, where the matters relied on by the SSHD/ ECO consist solely of the public interest in maintaining a firm immigration policy; (v) *It can therefore be seen that Appellants in Gurkha (and BOC) cases will not necessarily succeed, even though (a) their family life engages Article 8(1); and (b) the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here earlier. 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.*

14. In Patel, Modha and Odedara v ECO (Mumbai) (2010) EWCA Civ 17 the Court of Appeal recognised that one could set out to compensate for a historical wrong, but one could not reverse the passage of time. Where children had grown up and embarked on lives of their own, the bonds which constituted family life would no longer be there and Article 8 would have no purchase. However, what might constitute an extant family life fell well short of what constituted dependency. Many adult children might still have a family life with parents settled in the UK, not by leave or by force of circumstance, but by long delayed right. That was what gave the historical wrong a potential relevance to Article 8 claims. That did not make the ECHR a mechanism for turning back the clock, but it did make the historical wrong potentially relevant to the application of Article 8(2). If, by the time the adult children sought entry they were no longer part of the family life of the BOC who had finally secured citizenship in the UK, the threshold of Article 8 would not be crossed and the proportionality of excluding them would not be an issue. If they came within the protection of Article 8(1) however, the balance of factors determining proportionality for the purposes of Article 8(2) would be influenced by the historical wrong, perhaps decisively.

15. In PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 it was held that some tribunals appeared to have read Kugathas [2003] EWCA Civ 31 as establishing a rebuttable presumption against any relationship between an adult child and his parents or siblings being sufficient to engage Article 8. That was not correct. Kugathas required a fact-sensitive approach, and should be understood in the light of the subsequent case law summarised in Ghising (family life – adults – Gurkha policy) [2012] UKUT 160 (IAC) and Singh [2015] EWCA Civ 630. There was no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 nor was there any requirement of exceptionality. It all depended on the facts. The line of case-law was again considered in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 (in the context of the adult son of a former Gurkha soldier).

16. The Judge's decision contains material errors of law. Between [20] and [24] the Judge describes the component parts of article 8 family life. His finding that article 8 is not engaged cannot stand. The Judge does not consider historic injustice as a crucial element in the overall proportionality exercise. The Judge erroneously finds that article 8 family life is not established, and so he does not carry out a proportionality assessment. These are all material errors of law. I therefore set the decision aside.

17. Although I have set the decision aside, there is sufficient material available to me today to enable me to substitute my own decision.

The Facts

18. The facts of this case are that the appellant's father is her sponsor. He served in the brigade of Gurkhas from 2 January 1962 until 31st of August 1971. On discharge his service was described as exemplary.

19. The appellant has seven siblings. 3 have married and have started their own families in Nepal. The appellant's younger siblings have all been granted indefinite leave to remain in the UK. The appellant's father and mother were granted leave to enter the UK in 2011. The appellant's father came to the UK in March 2011. The appellant's mother remained in Nepal until November 2011 so that the appellant would not be left alone. The appellant's mother did not come to the UK until arrangements were made for the appellants accommodation and continuing education.

20. The appellant's parents have visited the appellant in Nepal a number of times since 2011. Each month the appellant's parents send money to the appellant for maintenance, accommodation and education. Every day there is telephone contact between the appellant and her parents.

21. Since 2011 the appellant and her parents had been investigating ways in which the appellant can re-join her parents and her four younger siblings in the UK. The appellant has studied since 2011 and has graduated with a BSC. She is now studying towards a Master's degree.

22. The appellant is dependent on her parents for maintenance and accommodation. She does not work and does not have an independent source of income. She is fully supported by her parents. The appellant's parents telephone her several times each week. The appellant's parents have made repeated visits to Nepal since 2011 solely so that they can see the appellant. The appellant is single and has no dependents. The appellant wants to come to the UK so that she can live with her parents. The appellant's parents want the appellant to come and live with them. They have adequate accommodation for the appellant.

23. If it had been possible for the appellant's father to enter the UK on discharge from the army, he would have come to the UK then, and he would have brought his entire family with him. The prospect of entry to the UK only opened up to the appellant when annex K was introduced to the rules in 2015.

24. The appellant's mother is so worried about the appellant that she is considering leaving the UK to live with the appellant in Nepal.

<u>The Immigration Rules</u>

25. The respondent refused this application after considering the Immigration Directorate Instructions, chapter 15, section 2A, annex K which came into force in January 2015. The respondent focused on sections 9(5) and 9(8).

26. Section 9(5) of annex K relates to emotional and financial dependence. On the facts as I find them to be the appellant is both emotionally and financially dependent upon her father, who is a former Gurkha. The appellant therefore meets the requirements of section 9(5) of annex K.

27. Section 9(8) says

> 'The applicant has not been living apart from the former Gurkha for more than two years on the date of application, and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the applicant lived away)'

28. Although it is argued for the appellant that the family unit remains the same because of the close links between the appellant and her parents and because of the patriarchal nature of Nepalese society, the cold fact is that the appellant has lived apart from her parents since 2011. At the date of application, the appellant and her father were in separate households and had been for five years.

29. The appellant cannot meet the requirements of annex K of the immigration rules solely because 4 years before she had the prospect of applying for entry clearance her parents were granted leave to enter the UK. The appellant cannot meet the terms of either appendix FM or paragraph 276 ADE of the immigration rules.

Article 8 ECHR

30. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…"

31. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

32. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

33. I remind myself of what is said in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC), in Patel, Modha and Odedara v ECO (Mumbai) (2010) EWCA Civ 17**,** in PT

(Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 and in Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320 (set out at [13] to [15] above).

34. On the facts as I find them to be the appellant is still entirely dependent upon her parents, both emotionally and financially. The appellant's parents provide her accommodation and her income. The appellant's parents visit her regularly in Nepal, and there is regular telephone and Internet contact between the appellant and her parents. On the facts as I find them to be, earlier applications have been made to enable this appellant to settle in the UK with her parents. On the facts as I find them to be, it is because of an acknowledged historical injustice that this appellant is not living with her parents. I therefore find that family life within the meaning of article 8 of the 1950 convention exists.

35. As I find that article 8 family life exists, the burden of proof moves to the respondent. Section 117B of the 2002 tells me that immigration control is in the public interest, but that is not all that there is to assessment of proportionality. The appellant does not speak English and is not financially independent, those are factors which I must weigh against the appellant. Against those I weigh the historical injustice as discussed in Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) & Gurung and others [2013] EWCA Civ 8.

36. Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) tells me that

> "... 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, where the matters relied on by the SSHD/ ECO consist solely of the public interest in maintaining a firm immigration policy"

37. On the facts as I find them to be the appellant would have settled in the UK with her parents as a child were it not for the historical injustice which is recognised by both the respondent and the courts. The respondent's decision renders the appellant a secondary victim to that injustice. When I consider all of these matters I can only find that the respondent's decision is a disproportionate breach of the right to respect for family life. I find that the Decision appealed against causes the United Kingdom to be in breach of the law or its obligations under the 1950 Convention.

38. The appeal is allowed on article 8 ECHR grounds.

CONCLUSION

39. The decision of the First-tier Tribunal promulgated on 18 September 2017 is tainted by a material error of law. I set it aside.

40. I substitute my own decision.

41. The appeal is allowed on article 8 ECHR grounds.

Signed Paul Doyle Date 19 March 2018
Deputy Upper Tribunal Judge Doyle