Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/**05863/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2019	**On 14 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

MISS BHU KUMARI PUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr D Balroop, of Counsel instructed by Messrs Arkas Law
For the Respondent: Mrs L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of Judge of the First-tier Tribunal K R Moore who in a determination promulgated on 11 January 2019 dismissed the appellant's appeal against a decision of the Entry Clearance Officer to refuse to grant her leave to enter on human rights grounds.

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2. The appellant, a citizen of Nepal, was born on 4 September 1984. Her father retired from the Gurkhas in 1987. In September 2009 her parents entered Britain with indefinite leave to enter, with her brother who was aged under 18. She has a second brother who is a British citizen who lives in Germany and her younger brother and a sister are both British living in Britain. The appellant has two sisters who are married and live in Nepal.

3. It is of note that the issue of "historical injustice" was first formulated by the Court of Appeal in the case of **Gurung and Others v SSHD [2013] EWCA Civ 18**. That case was followed by the IDI, Annex K (adult dependent children of former Ghurkhas) of 22 January 2015 which dealt with the issue of the human rights of the dependents of former Gurkhas who were aged over the age of 18. In effect the provisions of Annex K paragraph 9(8) and of IDI Chapter 15 Section 2A 13.2 leads to the presumption that the children of Gurkhas aged between the ages of 18 and 30 should be granted entry to Britain on human rights grounds unless there are strong reasons to the contrary.

4. The appellant made the application in November 2017. At that age she was aged 33. In refusing the application the respondent referred to paragraph 9(4) of Annex K and, although accepting that the appellant had provided evidence that her sponsor -her father - had been financially supporting her in Nepal. The letter of refusal stated:- "I am not satisfied that you are wholly financial or emotionally dependent on your sponsor; as required under Annex K, paragraph 9(5) of IDI Chapter 15, Section 2A, 13.2". In amplification the Entry Clearance Officer commented that to qualify the appellant should normally have lived apart from the sponsor for not more than two years on the date of application unless the family unit had been maintained if the appellant had been at boarding school, college or university as part of their full-time education but had lived in the family home during holidays.

5. The letter of refusal stated that the appellant had been living apart as a direct result of the sponsor migrating to Britain rather than as a result of her being away from the family unit as a consequence of education or other requirements. It was considered that there were no exceptional compassionate circumstances relating to the appellant's case and the writer of the letter of refusal referred to the judgment in **Gurung** stating that that case indicated that if a Gurkha could show that but for the historic injustice he would have settled in the UK at a time when his dependant and now adult child would have been able to accompany him as a dependant under the age of 18 there would be strong reasons for holding that it would be proportionate to admit an adult child to join his family now.

6. It was noted that when considering the issue of the public interest in maintaining firm immigration control if it were the case that but for the historic wrong the appellant would have been settled in the UK long that

would ordinarily determine the outcome of the Article 8 proportionality assessment in the appellant's favour if the Secretary of State relied solely on the public interest in maintaining firm immigration policy. However in the refusal the respondent stated that:- "I am satisfied the reasons for your refusal outweigh the consideration of historical injustice."

7. The letter of refusal noted that the appellant had grown up in Nepal. Her parents had chosen to apply for settlement visas while she was already an adult and did so in the full knowledge that their adult children did not automatically qualify for settlement. There was no bar to the sponsor returning to Nepal either permanently or temporarily to be with the appellant and therefore family life could continue as it had done in the past without interference. Even if it was accepted that the refusal might be an interference with the appellant's private life the respondent was not satisfied that family life had been established with the parents over and above that between an adult child and parents stating that it was the respondent's obligation to take into consideration how the historic injustice had affected the appellant individually. It was not considered that the historic injustice had prevented the appellant from leading a normal life and therefore the decision was not disproportionate.

8. The judge noted that the Presenting Officer stated that Article 8(1) had not been engaged referring to the decision in **Rai v ECO** HU/08538/2015 has no adequate dependence had been demonstrated so as to engage Article 8 (1). He noted the evidence of the appellant's father that although he had not returned to Nepal his wife had visited the appellant on three occasions and that he had always intended to make an application for the appellant to join him so that they could live together as a family unit. The sponsor had stated that the appellant was unemployed and not highly educated having given up studies after she failed the tenth grade and that she had always been dependent emotionally on him. It was the appellant's father's evidence that the family separation had caused much stress to both her parents. They had made every attempt to continue to maintain regular communication. It was emphasised that the first policy for Gurkha veterans had been made in 2004 after the sponsor had retired. The judge noted the reference to the decision in **Rai** made by the appellant's representative and noted the terms of the judgment in **Kugathas v SSHD [2003] EWCA Civ 31** and also noted that family life with the parents did not suddenly cease to have a family life when the child turned 18 years of age.

9. In paragraphs 18 onwards the judge set out his findings of fact and conclusions. Having first stated that the issue of historical injustice was a key issue the judge referred to the judgment in **Gurung** where it had been observed that:

> "The historic injustice is only one of the factors to be weighed against the need to maintain a fair and firm 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."

The judge noted that if a Gurkha could show that but for the historic justice he would have settled in Britain at a time when his dependant would have been able to accompany him as a dependent child under the age of 18 that was a strong reason for holding it proportionate to permit the adult child to join his family now. He noted the guidance given in the case of **Ghising and Others [2013] UKUT 00567 (IAC)** and that the historic injustice would carry significant weight on the appellant's side of the balance but he also referred to the case of **Rai** where it was noted that it could immediately be appreciated there had been many cases where the appellant in Gurkha cases would not succeed even if the right to family life engages Article 1 and the evidence shows that the child would have come to the United Kingdom with his or her father but for the injustice that prevented the latter from settling here on completion of his military service. The judge, however, placed weight on the fact that the appellant did not make an application until November 2017 despite the fact that her parents had come to Britain in 2010. Moreover, the appellant had two other sisters who lived in Nepal and were both married and lived with their respective fathers. The appellant's father had stated that the appellant was over 18 when he had come to Britain and he had been advised that she would not get a visa and that an application would have to be made after arrival in the United Kingdom and that the sponsor had stated that he had always intended to make an application in respect of the appellant to join her parents in the United Kingdom but this had not happened until 2017. The judge accepted that although the appellant's father had not returned to Nepal since arriving in Britain her mother had done so on three separate occasions over the past eight years. He took into account that the appellant had grown up in Nepal, had attended school there and her two sisters continued to live in Nepal albeit with their own families. He stated that it was the parents of the appellant who chose to apply for settlement visas when the appellant was already at that time an adult and had presumably they had been aware or at least should have been aware, that the appellant would not automatically qualify for settlement. The judge, having referred to the decision in **Gurung,** stated that he was not satisfied that there was a strong reason for finding that it would be proportionate to allow the appellant to be granted a visa to enter Britain.

10. Referring to the issue of family life the judge stated that the appellant was living independently from her parents and had not established a family life for the purposes of Article 8. He made that finding notwithstanding the fact that he accepted that the appellant was reliant on the sponsor for financial assistance and having accepted that the sponsor transferred his pension payments to the appellant in Nepal and that further sums were also sent to the appellant. The judge also accepted that there was regular telephone contact between the appellant and her parents but said there were no health issues and that the appellant was a fit and healthy young woman who was leading an independent life of her own. The dependency

was, he considered, primarily a financial one. He considered that even taking into account the issue of historic injustice it was not such that the appellant had been prevented in leading a normal and dependant life in Nepal and therefore having undertaken the proportionality assessment under Article 8 he concluded that the decision was proportionate and having confirmed that he was not satisfied the appellant met the requirements outlined in Annex K of the IDIs, Chapter 15, Section 2A, he dismissed the appeal.

11. The grounds of appeal on which Mr Balroop relied argued that the judge had erred by only taking into account the factors that arose at the date of decision – a ground which really has no force as there has been no change in the circumstances in any event. They went on to state that the judge, having found that the appellant was financially dependent, had erred when stating that it was relevant that the parents of the appellant had chosen to apply for settlement visas when the appellant was an adult and that he was not satisfied there was a strong reason to find that it would now be proportionate to allow the appellant to enter Britain. It was argued that the fact that he had found that the appellant was living independently from her parents and had not established family life and that he was satisfied any dependency was primarily a financial one were not findings on which he should have placed weight when concluding that the historical injustice had not be such that the appellant had been prevented in leading a normal life. The argument put forward was that in the case of **Rai v ECO New Delhi [2017] EWCA Civ 320** the court had addressed the issue of dependency and stated that the factors such as those on which the judge relied such as the willingness of the parents to leave the appellant in Nepal and coming to Britain did not confront the real issue which was whether as a matter of fact the appellant demonstrated that she had a family life with her parents that existed at the time of their departure to settle in Britain and beyond.

12. The grounds therefore stated that the decision in **Rai** meant that the judge had erred in law. Turning to the judgment in **Gurung** it was stated that the judge had misconstrued the dicta therein as the appellant's father had been denied the opportunity to apply for indefinite leave to remain when he first retired and had he been able to come to Britain then the appellant could have come with him and that there was a strong reason to hold it proportionate now that she be able to join her family. The grounds also referred to the decision in **Ghising [2013] UKUT 567 (IAC)** which states that if the respondent could point to matters over and above the public interest in maintaining firm immigration policy those factors should be factors such as whether or not family life was engaged should be given appropriate weight: factors such as a bad immigration history or criminal behaviour might still be sufficient to outweigh the powerful factors bearing on the appellant's side of the balance. Mr Balroop took me to the relevant passages of the determination which he argued the judge had erred in law by not following the cases of **Rai** and **Gurung.** He asserted that the sponsor would have come to Britain in 1987 when he retired. The judge

had found that the appellant was financially dependent and he argued that the judge should have found that family life was engaged.

13. In reply, Mrs Kenny argued that the judge had found that financial dependency on the sponsor was not enough and that it was relevant that the appellant had not applied until 2017. She referred to paragraph 42 of the judgment in **Rai** which set out factors to show whether or not family life still existed. The judge, she said, had accepted the reasons why the respondent had considered that that was not the case. She then referred to the provisions of Annex K and stated that in effect the appellant would have failed on three points raised in that annex which analysed the requirements of for entry: firstly, the appellant was over 30, secondly, she did not meet the financial requirements and, thirdly the family had not been living apart for less than two years. She stated the issue was a proportionality exercise and that the factors set out paragraphs 59 and 60 of **Ghising** were relevant: these emphasised that the weight to be afforded to the historic wrong in the proportionality balancing exercise did not mean that being an adult child of a UK settled Gurkha ex-servicemen was a trump card because of all the factors which should be taken into account.

14. In reply, Mr Balroop referred to the headnote in **Ghising** which stated that where it is found that Article 8 was engaged and but for the historic wrong the appellant would have been settled in the United Kingdom that would ordinarily determine the outcome of the Article 8 proportionality assessment where the matters relied on by the Secretary of State or Entry Clearance Officer consisted solely for the public interest in maintaining a firm immigration policy. Moreover of note was the headnote in that case at 5 which stated:-

> "It can therefore be seen that the appellant in Gurkha … cases will not necessarily succeed, even though (i) their family life engages Article 8(1); and (ii) 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 of 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."

Mr Balroop again stated that there was no "bad immigration history and/or criminal behaviour in this case and therefore the balance should lie in favour of the appellant. He argued that the appellant never worked and relied on her father for financial support.

Discussion

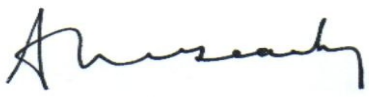
15. I consider that there is no material error of law in the determination of the judge. He clearly had in mind relevant case law. He properly assessed the facts. He did find that the appellant was financially dependent at the present time on the sponsor. He properly considered the issue of the appellant's family life noting that an adult child could still have family life with a parent despite being over the age of 21. He gave reasons for finding, however, that the mere transfer of funds did not engage family life in this case. I consider that he made no error in doing so notwithstanding the indication in **Rai** that the transfer of funds was sufficient to show that family life was engaged. But in any event I do not consider that is a material point because the judge quite properly went on to consider the proportionality of the decision. In that regard I consider he was entitled to place weight on the fact that the appellant's parents came to Britain in 2009 and eight years passed before the appellant made the application to enter. There appears to have been no clear reason given why that was the case. The reality is that the decision to apply was not made until four years after the judgment in **Ghising** when the issue of historical injustice was highlighted. At that stage the appellant might well have met the requirements in Annex K which were to come into force two years later.

16. The judge did properly consider all relevant factors including the fact that the appellant is a healthy young woman who has siblings in Nepal. There does not appear to have been any evidence given as to why she is not able to form her own household or work in Nepal. I consider that, as was stated in the determination in **Rai,** the issue of historical injustice is not a trump card. I consider that there has been no unfairness in the way this appellant has been treated. No decision was made that she should apply for leave to enter until eight years after her parents had come to Britain. Moreover, the appellant was aged 33 when the application was made. I consider that Annex K of the IDIs is compliant with the provisions of the ECHR and that the policy therein follows relevant case law. The cut-off point of age 30 is not unreasonable, but accepting that that is not a hard and fast rule the reality is that a further 3 years passed before the application as made.

17. I consider therefore that the decision on the issue of proportionality made by the judge was one which was entirely open to him and for that reason I find there is no material error of law in this determination and the decision of the judge shall stand.

Notice of Decision

This appeal is dismissed.
No anonymity direction is made.

Signed:  Date: 5 May 2019
Deputy Upper Tribunal Judge McGeachy