Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11606/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 July 2019	**On 29 July 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

Deepa Limbu
[Anonymity direction not made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr D Balroop, instructed by Everest Law Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Beg promulgated 30.4.19, dismissing her appeal against the decision of the Secretary of State, dated 1.5.18, to refuse her application for entry clearance as the adult dependent relative of her mother, settled in the UK as the widow of a former Gurkha soldier from Nepal.

2. The grounds allege that the First-tier Tribunal erred in law in:

   (a) Failing to provide adequate reasons for finding family life was not engaged;

(b) Failing to accord appropriate weight to the issue of historic injustice when conducting the article 8 proportionality balancing exercise;

3. First-tier Tribunal Judge McCarthy granted permission to appeal on 14.6.19, on the basis that it was arguable that the judge failed to properly apply the decision of the Court of Appeal in Rai v Entry Clearance Officer [2017] EWCA Civ 320, where the key issue was held to be whether family life between the appellant and her sponsoring mother had been severed. It was arguable that the proportionality assessment was flawed, failing to give appropriate weight to the historic injustice relating to the children of ex-Gurkhas.

Error of Law

4. For the reasons summarised below, I found such error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Beg should be set aside and the appeal remade by allowing it.

5. The relevant factual background is as follows. The appellant was born and raised in Nepal in 1988, after her father retired in 1987 following 13 years' service in the Brigade of Gurkhas. He passed away in 1994. In 2006, her mother exercised her right to apply for settlement in the UK at a time when the appellant was already an adult and knowing that adult children of Gurkha veterans do not automatically qualify for settlement in the UK. The appellant is now 31 years of age.

6. It is common ground that Gurkha veterans discharged before 1997 were denied an opportunity to apply for settlement in the UK, until 2004. This is what has become known as the 'historic wrong' or 'historic injustice.' Policy introduced in 2009 provided an opportunity for adult children of Gurkha veterans to apply for settlement but only on exceptional circumstances. The policy was amended to remove the requirement of exceptionality following the guidance cases of R(Gurung) v SSHD [2013]and Ghising and others (Gurkhas/BOCs – historic wrong – weight) [2013] UKUT 567, where it was held that where article 8 is engage and but for the fact of the historic injustice the appellant would have settled in the UK long ago, this will ordinarily determine the outcome of the article 8 proportionality assessment in the appellant's favour where the matters relied on by the Secretary of State or Entry Clearance Officer consist solely of the public interest in maintaining a firm immigration control. In Rai v ECO [2017] EWCA Civ 320, the Court of Appeal held that the real issue under article 8 is whether as a matter of fact the appellant has demonstrated a family life with his or her parents which existed at the time of their departure to settle in the UK and has endured beyond it notwithstanding that they left Nepal.

7. At [13] the judge accepted the remittances sent by the sponsor to the appellant in Nepal and that the evidence of messages demonstrated she had maintained contact with her daughter. At [15] the judge found that the sponsor has maintained a close relationship with all of her children. At [16] the judge found that the appellant and her mother enjoyed family life together in Nepal and found "that that relationship continued when the

sponsor came to the United Kingdom." The judge went on to find that the sponsor financially supports the appellant, finding at [18] that the appellant is unemployed, living in the family home, and reliance on her mother to send funds for her maintenance. The judge also found that there was a level of emotional support between them, maintained through telephone contact. The judge also took account at [14] of the difficulties the appellant has in requiring hearing aids for bilateral senso-neural hearing loss.

8. However, purporting to apply the Kugathas principles, the judge concluded that the relationship did not go beyond normal emotional ties to to relationship of "real committed and effective support" within the meaning and purpose of article 8. It is complained, with reason, that this conclusion was left entirely unreasoned and it is further suggested that it flies in the face of the accepted evidence and findings of fact.

9. Applying Rai, the question was whether the family life that the judge accepted existed between mother and daughter in Nepal had continued, or had been severed. In this regard, the judge made several findings of fact in the appellant's favour and, whilst at [17] the judge found that the appellant was capable of living an independent life, there was no finding that she was in fact living independently of the family life that existed with her sponsoring mother. Indeed, all the evidence pointed to the contrary.

10. Mr Balroop relied on the grounds as drafted. Very fairly, Mr Tufan accepted that if article 8 family life has continued, then the historic injustice is sufficient to outweigh the sole public interest in maintaining firm and fair immigration control.

11. I am satisfied that the findings of the judge should have led to the inevitable conclusion that family life had not been severed. It followed that family life was engaged for the purpose of article 8. It also follows that the judge should then have conducted the proportionality balancing exercise, attaching significant weight to the historic injustice. In that regard, it appears that the respondent did not rely on any public interest other that the maintenance of immigration control.

12. In the light of the findings of fact, I am satisfied that in accordance with the guiding principles from the case law the judge should have given greater weight to the historic injustice in the proportionality balancing exercise and found the decision to refuse entry clearance disproportionate. The appeal should have been allowed.

Decision

13. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a whole fee award.

Reasons: The appeal has been allowed.

Signed DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated