Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42780/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 July 2014	**On 1 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

RUTH RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Duncan of Counsel instructed by NC Brothers & Co., solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of Nepal born on 14 January 1978. On 7 February 2011 she arrived with leave to enter as a Tier 4 (General) Student migrant, expiring on 28 September 2012. While the Appellant had been in the United Kingdom with leave as

a student her parents had arrived on 2 March 2012 with entry clearance for settlement. The Appellant's elder sister is in the United States of America and her younger brother remains in Nepal.

2. On September 2012, before expiry of her student leave, the Appellant applied for indefinite leave to remain as the adult dependant of her father, a former member of the Brigade of Gurkhas.

The Decision and Appeal

3. On 10 October 2013 the Respondent refused the Appellant's application. In the reasons letter of the same date she referred to chapter 15, Section 2A of the Immigration Directorate Instructions (the IDI) and in particular paragraph 13.2 containing the instruction to case workers that dependents over the age of 18 of HM Forces members (including Gurkhas) who are not otherwise covered in this guidance would normally need to qualify for settlement under a specific provision of the Immigration Rules. Applications from over aged dependents of serving members of the forces would normally be approved if the applicant was part of the family unit.

4. The Respondent therefore refused the application under paragraph 322(1) of the Immigration Rules because the Appellant was seeking leave to remain for a purpose not covered by the Rules. She also made a decision to remove the Appellant to Nepal by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

5. The Respondent noted the Appellant had come to the United Kingdom to obtain a post-graduate qualification in Health and Social Care Management. She acknowledged the Appellant had been funded by her father but concluded the Appellant was fit, had lived independently and could return to Nepal where, if necessary, she could be maintained by her parents from the United Kingdom.

6. The IDI had been prepared having regard to recent case law which had acknowledged the historic injustice worked on the Gurkhas who had been unable to settle in the United Kingdom with their families before 1997.

7. The Respondent considered any claim which the Appellant might have under Article 8 of the European Convention as embodied in the Immigration Rules and found that she did not meet the requirements of paragraph 276ADE and Appendix FM. She did not fall within the scope of any of the Respondent's relevant policies and could return to Nepal where she had social, cultural and family ties and could easily re-adapt.

8. The reasons letter did not make any reference to any claim that the State's obligations to respect the Appellant's private and family life under Article 8 of the European Convention outside the Immigration Rules were engaged.

9. On 17 October 2013 the Appellant lodged notice of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The grounds were that the Respondent had failed properly to apply the relevant discretionary policy and

that the decision was unlawful under Section 6 of the Human Rights Act 1998, being incompatible with the rights of the Appellant protected by European Convention. The grounds referred to and quoted from the judgments in *UG (Nepal) and Others v ECO [2012] EWCA Civ 58* and *Gurung and Others v SSHD [2013] EWCA Civ 8*.

The First-tier Tribunal's Determination

10. By a determination promulgated on 14 May 2014 Judge of the First-tier Tribunal Hawden-Beal dismissed the Appellant's appeal on all grounds.

11. On 3 June 2014 Judge of the First-tier Tribunal Landes granted permission to appeal on the grounds that it was arguable the Judge had failed to consider the mutual dependency of the Appellant and her parents and not just the dependency of the Appellant's parents upon the Appellant. Additionally, the Judge in her treatment of the claim under Article 8 had arguably not given sufficient consideration to the impact of the historic injustice worked on those who had served in the Brigade of Gurkhas and had not given adequate reasons for concluding there was no evidence the Appellant's father would have settled in the United Kingdom on or shortly after his discharge in 1982. The Appellant's father had so stated in his witness statement and had given oral testimony about it. It appears the original grounds of appeal and the grounds for permission to appeal are the same.

The Upper Tribunal Hearing

12. The Appellant and her parents attended. Mr Duncan submitted for the Appellant that the Judge had failed to have proper regard to the historic injustice worked against the Gurkhas and to have incorporated it as a factor to be considered in her assessment of the proportionality of the Respondent's decision to any lawful objective under Article 8(2). Mr Duncan submitted the determination in *Ghising and Others [2013] UKUT 00567 (IAC)* was in itself good grounds to consider the Appellant's claim under Article 8 outside the Immigration Rules, although he did not refer to any particular paragraphs of the determination. It may be that he had in mind paragraph 60 which states:

> Once this point is grasped, it can immediately be appreciated that there may be cases where Appellants in Gurkha cases will not succeed, even though their family life engages Article 8(1) and 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 on completion of his military service. If the Respondent can point to matters over and above the 'public interest in maintaining of a firm immigration policy', which argue in favour of removal or the refusal of leave to enter, these 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. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a 'trump card', in the sense that not every 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 be given to the historic injustice will normally require a decision in the Appellant's favour.

13. The Appellant's father at paragraphs 4 and 5 of his witness statement before the Judge had stated he would have settled in the United Kingdom after discharge if he had been permitted so to do. This claim had not been challenged before the Judge and remained unchallenged. The mechanism for former Gurkhas to settle in the United Kingdom had not been in place when the Appellant's father had been discharged from the Brigade of Gurkhas.

14. Mr Duncan expressed the view that the last part of paragraph 19 of the Judge's determination dealing with the possibility that in the future the Appellant's parents may require assistance from social services and that the Appellant as a nurse would be in a position to reduce any call on social services was itself an argument for the Respondent to consider the grant of leave outside the Immigration Rules.

15. Turning to the question of emotional ties and dependency, Mr Duncan referred to the grounds of appeal and paragraph 2 of the grant of permission to appeal. The Judge had looked at the need or likely need of the Appellant's parents to turn to the Appellant. At the hearing before the Judge there had been no challenge to the claimed mutual dependency between the Appellant who relied on financial support from her parents and their continuing love and affection in a home environment on the one hand and on the other her role as carer, interpreter and general facilitator, all of which manifested stronger than normal emotional ties between the Appellant and her parents.

16. The Appellant's father had two younger brothers in the United Kingdom in Swindon and in London referred to at paragraph 21 of the Judge's determination. There was evidence before the Judge that contact with them was limited and whether they could provide care and affection for the Appellant's parents was not explored at the hearing. The Judge's conclusions at paragraph 21 were inadequately evidenced. I remarked that this last point was not one of the grounds for appeal.

Submissions for the Respondent

17. Ms Everett submitted the Judge had been entitled to find there was insufficient evidence to support the claim of more than usual emotional ties between the Appellant and her parents. She argued the dependency of the Appellant was one of convenience and, further, financial dependency alone was insufficient to meet the relevant requirements. Consequently the Judge had not considered the claim under Article 8 outside the Immigration Rules because she had found the Appellant had not shown that there was any family life so as to engage Article 8.

18. She accepted the Appellant's father would have come to the United Kingdom on discharge if it had been possible because his claim to that effect had not been challenged. In that respect paragraph 20 of the Judge's determination was factually in error.

19. The Respondent had to accept that the Judge had failed to address the issue of the historic injustice but Ms Everett submitted that in the event this had not been necessary because the Judge had not found that the Appellant's family life was sufficient to engage the State's obligations under Article 8.

20. The comments in the last part of paragraph 19 of the determination about the prospective use of social services were neutral. In response, Mr Duncan simply submitted that the point about the last part of paragraph 19 of the determination was that it went to exclude adverse factors which might otherwise have counted against the Appellant when considering the other factors in the balancing exercise to assess the proportionality of the decision under Article 8.

Error of Law Finding

21. I have considered the submissions made for each of the Appellant and the Respondent in the context of the papers in the Tribunal file. I am satisfied the Judge made an error of law in failing to address the issue of the historic injustice worked upon the Gurkhas. The evidence clearly is that there is family life between the Appellant and her parents. The threshold for the establishment of family life is low: see *VW (Uganda) v SSHD [2009] EWCA Civ 5* and *AG (Eritrea) v SSHD [2007] EWCA Civ 801*. In that event, it was incumbent upon the Judge to proceed with the five step process endorsed by *R (oao) Razgar v SSHD [2004] UKHL 27* and to assess whether the interference with that family life which might be caused by the Appellant's removal would be sufficiently grave to engage the State's obligations to respect the private and family lives of the Appellant and her parents.

22. The parties agreed there was no challenge to the factual basis found by the Judge save as already has been mentioned. They considered the re-hearing could take place immediately on the basis of submissions only. I indicated that I had a number of questions I would want to put to the Appellant about her brother. The parties had no objection.

23. My questions of the Appellant upon which neither representative had any point arising elicited the information that the Appellant's brother, born in 1981, lived in a small town in Nepal in the family home, was unemployed and single and had no dependants.. He lived on the proceeds of a pension which his father had in Nepal.

The Substantive Re-Hearing: Appellant's Submissions

24. Mr Duncan submitted this was a single issue appeal focused on the Appellant's claim under Article 8 of the European Convention. Case law on Gurkha family re-unions was settled. The Respondent's various policies at different times had now been consolidated and required there to be exceptional circumstances. The policy was discretionary. The reasons letter showed the Respondent had considered the policy

and found there were no exceptional circumstances and therefore that decision was not challengeable.

25. Turning to the claim under Article 8, he referred back to the submissions he had made to show there was an error of law in the Judge's determination. He referred to the judgment in *R (oao Gurung and Others) v SSHD [2013] EWCA Civ 8* and the determination in *Ghising and Others (Gurkhas/BOCs: historic wrong: weight [2013] UKUT 00567 (IAC)*. He referred generically to the historic wrong worked upon the Gurkhas and that the Respondent had not challenged the evidence of the Appellant's father that had he been able upon discharge from the Brigade of Gurkhas he would have settled in the United Kingdom with his family. The Respondent had not identified any matters over and above the "public interest in maintaining a firm immigration policy" to argue in favour of a refusal of leave to enter: see paragraph 60 of the determination in *Ghising and Others [2013] UKUT 00567 (IAC)*.

26. The next question the Tribunal had to address was whether the relationship between the Appellant and her parents in the United Kingdom went beyond normal emotional ties of the type described in *Kugathas v IAT [2003] EWCA Civ 31*. The evidence showed there was a mutual emotional dependency described in the statements of the Appellant and her father as well as the solicitor's letter accompanying the Appellant's application for further leave. The Appellant provided care for her parents and particularly her father, who suffered from sleep apnoea as well as interpreting and other general caring duties. The relationship had to be considered in the context of the nature and expectations of Nepalese culture. The Appellant's father had rendered notable service to the United Kingdom by reason of his long and exemplary service with the Brigade of Gurkhas. The appeal should be allowed.

Submissions for the Respondent

27. Ms Everett relied on the submissions she had made to argue that the First-tier Tribunal's determination did not contain an error of law. She continued that the evidence did not show the Appellant had emotional ties with her parents beyond normal emotional ties of the type described in *Kugathas*. The Appellant was now aged about 35, had qualified as a nurse and had obtained a post-qualification diploma. She had lived independently of her parents and indeed they had lived independently of her for a time. Her present financial dependency upon her parents was insufficient to establish a sound claim under Article 8. She had originally come to the United Kingdom before her parents to obtain further qualifications to improve her employment prospects. The appeal should be dismissed.

Standard and Burden of Proof

28. The standard of proof is the civil standard; that is on the balance of probabilities. Evidence of matters subsequent to the date of decision under appeal may be taken into account. Generally speaking, the burden of proof is on the Appellant subject to the limitations suggested by the comments of Sedley LJ in *Patel and Others v ECO – Mumbai [2010] EWCA Civ 17* that the effect of the acknowledgement of the historic wrong is to some extent to reverse the usual balance of Article 8 issues. Given the

development and clarification of the jurisprudence since *Patel*, it is unlikely that any adjustment of the burden is likely in this case to make any difference to either party. The fact of the historic wrong is simply another factor to be placed in the balance when assessing the proportionality of the Respondent's decision.

Applicable Law to the Claim under Article 8 outside the Rules

29. *MF (Nigeria) v SSHD [2013]* is acknowledged to be a current leading judgment in the jurisprudence relating to Article 8 of the European Convention in English law. It focuses on the application of Article 8 both within the Immigration Rules and outwith the Rules in cases involving the deportation of foreign non-EEA national criminals. Paragraph 398 of the Rules which relates to deportation uses the phrase 'exceptional circumstances'. At paragraphs 39 and 40 the Master of the Rolls said:-

> (Counsel) has made it clear on behalf of the Secretary of State that the new Rules do not herald a restoration of the exceptionality test. We agree. ...The Rules expressly contemplate a weighing of the public interest in deportation against 'other factors'. In our view, this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account.
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> ...It is necessary to focus on the statement that it will only be 'in exceptional circumstances that the public interest in deportation will be outweighed by other factors'. ...Great weight should be given to the public interest in deporting foreign criminals.... It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in their deportation.

At paragraph 41, the Master of the Rolls referred to the judgment in *R (Nagre v SSHD [2013] EWHC 720 (Admin).* He pointed out that the significance of the cases cited in *Nagre* was in the repeated use by the European Courts of Human Rights of the phrase 'exceptional circumstances.

30. I take it he was referring to paragraph 40 of the judgment in *Nagre.* With one exception each of the ECtHR cases in the long list is from jurisdictions other than the United Kingdom where the domestic law within the margin of appreciation of contracting states may and in some cases does (for example Norway and Denmark) provide that the test for engaging rights protected by the European Convention is more stringent than the test of reasonableness established by *Huang v SSHD [2007] UKHL 11. MF (Nigeria)* makes the point that in assessing the proportionality of a deportation decision it will only be in exceptional circumstances that the public interest will be outweighed by other factors. But this is not a deportation case.

31. At paragraph 128 of *R (oao MM and Others) v SSHD [2014] EWCA Civ 985* in the leading judgment Aikens LJ in the course of a lengthy discussion of the relationship of the jurisprudence on Article 8 in the context of the Immigration Rules and Strasbourg case-law said:-

> …. Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary

> to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. …..

and at paragraph 134:-

> …… if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the *Huang* tests and UK and Strasbourg case law.

32. The test of exceptional circumstances is different from the approach referred to in the Section of Chapter 8 of the Immigration Directorate Instructions on family members dealing with Appendix FM. Section 1.0 Introduction provides:-

> This guidance reflects the two-stage approach to considering applications under the family and private life Rules in Appendix FM and paragraph 276ADE-DH. First, caseworkers must consider whether the applicant meets the requirements of the Rules, and if they do, leave under the rules should be granted. If the applicant does not meet the requirements of the Rules, the caseworker must move on to a second stage: whether, based on an overall consideration of the facts of the case, there are exceptional circumstances which mean refusal of the application would result in unjustifiably harsh consequences for the individual or their family such that refusal would not be proportionate under Article 8. If there are such exceptional circumstances, leave outside the Rules should be granted. If not, the application should be refused.
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> This two-stage approach has been endorsed by the High Court in the Judicial Review in *Nagre*. In the judgment Sales J finds that our regime of Rules coupled with the Secretary of State's published policy on exceptional circumstances '…fully accommodates the requirements of Article 8' [paragraph 36] and '…there is full coverage of an individual's rights under Article 8 in all cases by a combination of the new Rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules' [paragraph 35]. ...

The test described in *MF (Nigeria)* is different from the Immigration Directorate Instructions which is not part of the Rules: see paragraphs 64 and 106 of the judgment in *R (Alvi) v SSHD [2012] UKSC 33*.

33. Further, at paragraph 54 of *Patel and others v SSHD [2013] UKSC 72* Lord Carnwath approved the approach to Article 8 described in *Huang* and that the Rules are no more than the starting point for the consideration of Article 8.

34. Indeed, the suggested logic that a test of exceptional circumstances or compassionate factors referred to in the Immigration Directorate Instructions has to be engaged before a less stringent test of "reasonableness" under Article 8 outside the Rules can be engaged is difficult to follow.

35. With this in mind, I adopt the approach to appeals on grounds of Article 8 in accordance with jurisprudence which comes from Strasbourg and from *Huang* and

subsequent judgments, which were summarised at paragraphs 7-12 of *EB (Kosovo) v SSHD [2008] UKHL 41*. The Appellant has established a private and family life in the United Kingdom. Given the circumstances her proposed removal would be an interference of such gravity that it would engage the United Kingdom's obligations under Article 8 of the European Convention to respect her private and family life in the United Kingdom. There was no suggestion that any interference would be otherwise than in accordance with the law and for the legitimate public end necessary in a democratic society of the interests of the economic well-being of the country referred to in Article 8(2) which includes the maintenance of proper immigration control (see *Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)*).

36. In assessing the proportionality of the decision under review in the case of Gurkha veteran family reunion cases it is also necessary to have regard to the Military Covenant: see paragraph 72 of *R (oao Limbu and Others) v SSHD and Others [2008] EWHC 2261 (Admin)* and the acknowledged historic injustice suffered by the Gurkhas: see paragraphs 2 and 27 of *R (oao Gurung and Others) v SSHD [2013] EWCA Civ 8*.

37. The facts are as set out in the First-tier Tribunal's determination. The Respondent has not challenged that the witness statement of the Appellant's father that he would have settled in the United Kingdom with the family on retirement from the Brigade of Gurkhas had he had the opportunity; thereby accepting the nexus with the historic injustice referred to in paragraphs 15 and 41 of *Patel and Others v ECO-Mumbai*.

38. The Respondent has not identified any adverse information of a serious nature about the Appellant of the type referred to in paragraph 40 of *R (oao Gurung and Others)*. The assessment of the proportionality of the decision under appeal has to be made bearing in mind what the Court of Appeal said at paragraph 43 of *R (oao Gurung and Others)*:

> We have referred to the reasons given at paras 83 and 84 of the UT determination in Rana for the conclusion that the historic injustice suffered by the Gurkhas carries substantially less weight than the injustice suffered by BOCs. But as we have seen at para 28 above, the UT also supported their conclusion as to the weight to be given to the historic injustice by the reasons given at paras 112 to 119 of their determination. We confess to having some difficulty in following the reasoning at paras 117 to 119 and in seeing, in particular, why the fact that an adult dependant child may be permitted to settle here in "exceptional circumstances" leads to the conclusion that the weight to be given to the historic injustice in conducting the article 8(2) balancing exercise is limited. The flexibility of the 'exceptional circumstances' criterion is such that it does not require the historic injustice to be taken into account at all. It certainly does not prescribe the weight to be given to the injustice, if indeed it is to be taken into account. The requirement to take the injustice into account in striking a fair balance between the article 8(1) right and the public interest in maintaining a firm immigration policy is inherent in article 8(2) itself, and it is ultimately for the court to strike that balance. This requirement does not derive from the fact that the policy permits an adult dependant child to settle here in exceptional circumstances. Accordingly, we reject this

> additional reason given by the UT for holding that the weight to be given to the historic injustice is limited.

It is accepted that there is a mutual emotional dependency between the Appellant and her parents. There was no challenge to the claim that the Appellant was and had always been financially dependent upon her father. The weight to be attached to the family life of the Appellant and her parents is limited in the light of what the Upper Tribunal said at paragraphs 47 and 48 of *Ghising and Others [2013] UKUT 00567*:-

> We reject (the) submission that, whatever the nature and quality of family life, the Appellants had a right to enjoy it, and therefore Article 8(1) was inevitably engaged. That this proposition is not correct can be seen from paragraph 14 of *Patel*, where Sedley LJ said:
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> > You can set out to compensate for a historical wrong, but you cannot reverse the passage of time. Many of these children have now grown up and embarked on lives of their own. Where this has happened, the bonds which constitute family life will no longer be there, and art. 8 will have no purchase.
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> But as Sedley LJ immediately went on to say 'what may constitute an extant family life falls well short of what constitutes dependency'. In this regard, we note the useful analysis by the Tribunal in *Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC)* (at paragraphs 50 to 62) of the case law on family life between parents and adult children, culminating in the finding that:
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> > 62. The different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive. In our judgment, rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1).

The Court of Appeal endorsed the approach of paragraph 46 of *R(oao Gurung and Others)*.

39. In this case, the Appellant came to study in the United Kingdom before her parents arrived. The evidence is that subsequently her father learned about the availability of entry clearance for settlement and came with his wife to settle. The reasons why the Appellant came to the United Kingdom were to study and improve her job opportunities. It was not suggested that this was in any way a ploy to enable her parents to come to the United Kingdom and indeed they came, with entry clearance granted in their own right as an ex-Gurkha and his wife. No adverse inference therefore from the timing should be made.

40. Looking at the matter in the round, considerable weight is to be given to the effect of the historic wrong and the measures taken by the legislature and executive to make compensation for that wrong. The Appellant lives with her parents as a part of a

single family unit. There was no challenge to the evidence about the extent of the care and support she gives to her parents, partly out of love, partly out of filial duty and partly out of respect for her native Nepalese culture and traditions. The Respondent did not refer to any adverse factors. Consequently, I find the decision to refuse further leave and remove the Appellant is disproportionate to any of the legitimate objectives identified in Article 8(2) of the European Convention and the appeal is allowed on the human rights grounds.

DECISION

The determination of the First-tier Tribunal contained errors of law and save as to the facts found, is set aside. The following decision is substituted:-

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed/Official Crest Date 31. vii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal has been allowed and I have therefore considered whether to make a fee award. The decision under appeal was made at a time when the understanding of the law in relation to Article 8 outside the Immigration Rules was subject to consideration by the Upper Tribunal and the Court of Appeal and in all the circumstances I do not consider it appropriate to make any fee award.

Signed/Official Crest Date 31. vii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal