Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01413/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 March 2014	**On 26th March 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

MR BASANTA LIMBU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding
For the Respondent: Mr R Jesurum

DETERMINATION AND REASONS

1. The parties are referred to as they were in the First-tier Tribunal so that hereafter Mr Limbu is the appellant and the Entry Clearance Officer is the respondent. The

appellant is a citizen of Nepal who was born on 30 December 1990. He applied to settle in the United Kingdom as the dependent son of a former Gurkha soldier. The application was made on 16 August 2012 under paragraph EC-DR.1.1 of Appendix FM of the Immigration Rules and the Home Secretary's policy as outlined in IDI Chapter 15 Sec.2A para 13.2 as updated on 12 March 2010. The application was refused and the appellant appealed. Included in the grounds of appeal is one that the decision breached his Article 8 ECHR rights. The judge hearing the appeal dismissed it under the Immigration Rules but allowed it under Article 8.

2. The Entry Clearance Officer appealed the decision and at a hearing on 6 November 2013 a panel comprising Mr Justice Cranston and I found errors of law in the determination and by our decision promulgated on 27 November 2013 gave reasons for so finding, set aside the decision and listed the appeal for a resumed hearing before me.

3. Mr Jesurum did not choose to call oral evidence. Submissions were made by both representatives.

Background

4. The background is set out in the error of law determination but what we said there is largely repeated here with some additions.

5. The appellant was born on 30 December 1990 and is one of three children of his mother and father. The appellant's sister was born on 27 September 1993 and the appellant's brother was born on 21 August 1996. The appellant's father was born in 1940 in Nepal. He married his first wife in 1957 and the following year, 1958, he joined the British Army as a Gurkha, serving until June 1971. There were two sons of that marriage, both of whom now live independent lives in Nepal, one born in 1963, the other in 1970. The father served in India, Malaysia, Borneo and Hong Kong. On his discharge in 1971 his commanding officer wrote of his exemplary military conduct and his twelve years of loyal service, during which he saw active service in Borneo.

6. The father's first wife died in 1980 and he married his current wife (born on 20 February 1960) in June 1981. After the changes in the policy relating to the settlement of Gurkhas, the father applied for settlement in the UK which was granted on 3 May 2010. According to his statement the father then sponsored his wife and the two minor children's applications and they were granted settlement on 20 January 2011. It appears that the father, wife and one minor sibling of the appellant entered the UK in June 2011 for settlement and have resided in the United Kingdom since then, with the appellant's sister joining them on 10 September 2011. It was not until 16 August 2012 that the appellant applied for entry clearance. According to the father's statement, after saving the required money he sent the application fee to the appellant, the application was then made but the application was refused on 5 December 2012.

7. The father is severely sight impaired (blind). Neither he nor his wife works. He receives pension credit; in 2011 it was £158.82 a week. He receives an attendance allowance, which in 2012 was £51.85 a week. He rents a ground floor flat in Aldershot. His wife supports him within the house but she does not speak English and is illiterate. The wife is reliant on help to do basic things such as shopping and assisting her husband to attend hospital appointments. The two younger children were students at the time of the proceedings before the judge.

8. The appellant is single and unmarried. According to the telephone interview record he has two paternal uncles who live in Nepal and a maternal uncle, but he has not met all of them for a long time. He has half-siblings born in 1963 and 1970 respectively, but again he has not met them for a long time. He used to live with his parents and siblings in the family home in Siddhapokhri. He moved from there since the other family members settled in the UK to live with a cousin in Kathmandu. The appellant collects his father's Nepalese army pension to pay the rent, pay for his school and for all his other living expenses. In February 2013 the appellant was attending the Centennial Higher Secondary School studying grade 12 as a hotel management student. He explained to the Entry Clearance Officer that there had been a gap of two years in his study from 2010 to 2012 when he had been assisting his family apply for settlement. He also told the Entry Clearance Officer that he himself had decided to move from Siddhapokhri to Kathmandu. He has regular contact with his parents through Skype and Facebook "once a day". In reply to a question about whether he had ever worked he said that he had not because he would not get a good job with the qualifications that he currently had.

9. In the refusal letter dated 5 December 2012 the Entry Clearance Officer referred to the Immigration Rules, Appendix FM, and concluded that he was not satisfied that the appellant would be adequately maintained, accommodated and cared for in the United Kingdom without recourse to public funds: paragraph E-ECDR.3.1. There had been no explanation as to how the rent was paid in Aldershot, but that was most likely to derive from public funds. Therefore he was not satisfied that the appellant would be adequately accommodated without recourse to public funds. Notwithstanding the policy regarding ex-members of HM Forces in IDI Chapter 15 Sec 2A para 13.2, the Entry Clearance Officer said that it was not clear what the exceptional circumstances were in the appellant's case. The Entry Clearance Officer said that he had no reason to doubt the valuable service the father had given when in the British Army, but the appellant had shown nothing exceptional beyond the normal relationship between parents and adult children. This was not sufficient of itself under the Rules. The appellant had returned to education after a gap of two years and that would provide better employment opportunities for him in Nepal. His father's financial support was not unexpected when he was a student. His father had the support of his mother and siblings.

10. The Entry Clearance Officer said that he could see nothing which would lead him to conclude that there were particular bonds in the appellant's case leading to the engagement of Article 8. There was nothing to indicate that the appellant was not capable of living an adult life. It was his father's decision to split the family in the

full knowledge that the appellant would not automatically qualify to join them. The maintenance and accommodation requirements of the Rules were intended to maintain effective immigration control.

11. The review by the Entry Clearance Manager dated 30 April 2013 noted that no further evidence had been submitted to address the points raised in the refusal letter. The Entry Clearance Manager restated the reasons given by the Entry Clearance Officer. He also noted that there were no guarantees that the father would have taken up the opportunity to settle in the United Kingdom immediately on his discharge, if that had been available. The historic injustice and its consequences were accepted. The appellant had stated that he had not worked in Nepal because his qualifications did not allow him to obtain a good job, which indicated that work was available but he had chosen not to take it.

12. In his witness statement the appellant said that he felt lonely without his family and that the relatives he had in Nepal were not considered close. In Nepal he had taken his father to medical appointments. His father said in his witness statement that, given that he had lost his eyesight he had relied on the appellant for help. His wife was not able to assist and his younger children were very young. The father was reliant on the goodwill of some of the ex-Gurkha community to assist and it would be much better if his son were in the United Kingdom where members of the family could support each other on a daily basis. He was worried about his son since the family unit had been broken. His hope was to be reunited again. It was a close family and the separation was causing suffering. The father also said:-

> "Had I been allowed to apply for settlement in the United Kingdom upon my army discharge, I would have applied together with my family. However I was never given the opportunity until recently after the Justice Gurkha campaign."

13. I mention at this point that the appellant made a previous application for entry clearance at the same time as his father in 2010 which application was refused on 24 September 2010 but not appealed. According to the father's statement the appellant was refused because he was already over age and the father's wife had not applied for settlement at the same time.

14. The father in his statement said also that the appellant is single and unmarried and is financially dependent on the father who sends him money for his maintenance and rent. The arrangement whereby the appellant rents a room in his cousin's house in Kathmandu was only meant to be temporary as the father wanted the appellant to join him and the family in the UK. In the Gurkha culture an unmarried child is the responsibility of the parents and hence is the father's full responsibility. The appellant is reliant on his father for financial support and his father reliant on him for physical support. The father was completely looked after by the appellant as the two minor children were very young at the time. Those children are full-time students and are still young and as such they cannot help him. His wife supports him within the house but she herself is reliant on help to do basic things such as grocery shopping and helping him attend hospital appointments. The father and his wife are

very worried about the appellant. The family unit has been broken up and they hope to be reunited again. It is a very close family and the continued separation is causing suffering to all and is breaking the tight family unit.

The Error of Law Hearing

15. The error of law hearing determination identifies four areas of error in the First-tier Tribunal's reasoning as to why the appeal was to be allowed. These are:-

    (a) the causation/reasons point;

    (b) blindness and family life;

    (c) Immigration Rules, policy and Article 8;

    (d) inability to meet maintenance requirements.

16. As to (a) **the causation/reasons point**, we had this to say:-

> "15. In giving the judgment of the Court of Appeal in **Gurung** (**R (Gurung) v Secretary of State for the Home Department [2013] EWCA Civ 8**) Lord Dyson had approved paragraph 15 of **Patel** (**Patel v Entry Clearance Officer (Mumbai) [2010] EWCA Civ 17**) but said later in the judgment, at paragraph 42, that if an ex-Gurkha 'can show that, but for the historic injustice, he would have settled' in the UK at the time when his dependent (now) adult child would have been able to accompany him as a dependent child, that was a strong reason for deciding the Article 8 proportionality issue in the adult child's favour. Mr Jesurum sought to dismiss this passage as obiter, in favour of what he contended is a causation test in paragraph 15 of **Patel**."
>
> 16. This is a difficult area of the law and the failure of the Presenting Officer to make any submission to us was unhelpful. The **Patel** test is open-ended ('would or might have settled ...') whereas the 'but-for' test in **Gurung** is the causation test frequently invoked in legal analysis. In our view while the adult child does not need to show the father's intention to settle at the date of discharge he must satisfy the 'but-for' test if he is to have the benefit of the historic injustice in the proportionality exercise. He must show that the father would have settled here and that he would have been able to accompany him as a dependent child under the age of 18 but for the historic injustice of exclusion.
>
> 17. In this case there is the passage in the father's statement, which we have quoted, about his intention to settle here. As we have said he was not cross-examined about it. His statement is that he would have applied for settlement 'upon my army discharge' had he been able to do so. He left the Gurkhas in June 1971, over 40 years ago. At that point he was still married to his first wife. So the point the judge makes about Gurkhas

serving under more restrictive conditions, giving less time with their families, had no bearing on the father's current family, although it may have affected him, his first wife and his sons by her. The father remarried in 1981 and the appellant was born in December 1990, in other words, some twenty years after the father's discharge. So for almost half the time since the father left the Gurkhas any intention on his part to settle here would not have been an intention to settle with the yet, as unborn, appellant. Moreover, there is no evidence that the father took steps after 2004 when there was the discretionary policy for Gurkhas from which he might have benefited. The judge simply passed over all these matters and this difficult area of causation. In our respectful view he was in error to do so."

17. As to (b) **blindness and family life**:-

"18. The judge found that the father's blindness led to what he characterised as dependence between the appellant and him. As Mr Jesurum correctly submitted, the judge did not find family life simply because of the father's blindness. He also said that the appellant was financially dependent on the father and cited **Pun and others (Gurkhas – policy – Article 8) Nepal [2011] UKUT 00377** as entitling him to take dependency of choice into account. He also found dependence for accommodation, and that the appellant and the father were emotionally close. Mr Jesurum submitted that the judge was entitled to make the findings, particularly in view of the uncontested evidence, and that the grounds were an attempt to relitigate the judge's conclusions.

19. The difficulty with the judge's findings is the lack of a real evidential base. All the appellant himself said in his statement was that his father was blind, that as the eldest it was his responsibility to help him and that he accompanied his father to medical appointments. The latter related to the position in Nepal. The father's admittedly uncontested evidence was also about what had been the position in Nepal: there he said that he was completely looked after by his son since his other two children were very young and his wife was illiterate and not able to help. None of that went to the situation since the father and the rest of the family moved here. Nor did it engage with the fact that, whatever the capabilities of the wife, the appellant's sister was nearly 20 years old at the time of the hearing, and the other son, 17 years old.

20. We fail to see how the **Kugathas** (**Kugathas [2003] EWCA Civ 31**) test of dependency can be met. The emotional dependence does not seem out of the ordinary, especially when the son is now 22 (21 at the time of the hearing). As to the appellant's reliance on the father for maintenance, there is Lord Dyson's observation in **Gurung** that this was normally to be expected. The Secretary of State's grounds suggest that the appellant could obtain employment with his qualifications, albeit that the

maintenance can continue if he wishes to continue his studies. In our view the judge's findings that there was family life are flawed."

18. As to (c) **Immigration Rules, policy and Article 8**:-

> "21. In his refusal letter the Entry Clearance Officer began with the Immigration Rules and the IDI policy. The judge did not engage with these Rules, although he stated that, consistently with the military covenant, paragraph 276X, SET 12.16 and the IDI did not require maintenance or accommodation. That weighed against exclusion. Mr Jesurum contends that the appellant had conceded that he was unable to qualify under the Rules and there was no need for the judge to analyse their application.
>
> 22. In our view the judge should have begun with the Rules and the policy. The proportionality exercise required in Article 8(2), once family life is established, is mediated through these since they spell out the basis of immigration control. Paragraph 13.2 of the policy refers to the exercise of discretion in the case of adult children in exceptional circumstances. This clear expression of public policy should have gone with (in) the balance, along with the historic injustice if it was causative when assessing proportionality in Article 8(2)."

19. As to (d) **inability to meet maintenance requirements**:-

> "23. In seeking to uphold the judge's findings Mr Jesurum submits that the judge was plainly aware of the family's financial circumstances and gave adequate reasons for not affording them great weight. Maintenance is not required in an application under the rules or the policy that relates to military families. Given that the judge was considering the proportionality balance under Article 8(2), we fail to see how further demands on public resources on the entry of adult children should not go into the balance."

The Resumed Hearing

20. Mr Jesurum filed a skeleton argument dated 10 December 2013 and made oral submissions also. Mr Wilding made oral submissions on behalf of the respondent.

21. Mr Wilding submitted that the relevant date to consider whether Article 8(1) is engaged was the decision date of 5 December 2012. By that time the appellant's father, mother and one sibling had been in the UK for some eighteen months and the other sibling arrived very soon thereafter. The evidence of emotional dependency is limited to the father's disability, namely his blindness. He is looked after in the UK by family members. There are the normal emotional ties between the appellant and his parents, but nothing beyond financial dependency. The appellant is living and studying in Kathmandu fending for himself. There is no suggestion that the father

has been significantly affected by the appellant not being around and this is not a case that hits the threshold of engagement. On that basis all other matters fall away.

22. Mr Wilding further submitted that if I found that family life is engaged there is the causation issue. The evidence before the First-tier Tribunal was that the father would have settled soon after 1971 if he had been able to. The appellant was not born until twenty years later and that is an important point as to how much weight should be given to the historical injustice. He made reference to the **Patel** and **Gurung** points analysed in the error of law determination and following **Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)** the historical injustice point was not necessarily determinative of the appeal. On any view the appellant could not meet the requirements of the Immigration Rules which are a declaration of the Secretary of State's policy. If the appellant was allowed into the country it is very likely that there would be further demands on the public purse. On a proper analysis great weight should be given to that fact given the importance of the legitimate aim of immigration control.

23. In response Mr Jesurum's submissions were in relation to what constitutes family life within the meaning of Article 8(1). He took me to the root authority of **Kugathas**. As an out of country case he accepted that for the remedy to be available by means of Article 8 the family life limb of Article 8 must be engaged. This is in contrast to an in country case where the appellant would fall under the protection of Article 8 by reason of his private life. If family life exists between the appellant and his parents who are in this jurisdiction, then it is the effect on Article 8 rights of the parents under **Beoku-Betts [2008] UKHL 39** that engages the Convention because the appellant, being in Nepal, is outside the territorial ambit of the Convention. The test for family life between adults is that something more exists than normal emotional ties. Although dependency is one way that family life can be established, it is not a pre-requisite. Sedley LJ in **Kugathas** accepted the submission that dependency was not limited to economic dependency and at [17] added:

> "But if dependency is read down as meaning 'support', in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, 'real' or 'committed' or 'effective' to the word 'support', then it represents in my view the irreducible minimum of what family life implies".

24. The submissions continue that the historical background is relevant because the sponsor endured separation from his family by reason of service. Although it is correct that the appellant had not yet been born, the previous separation and sacrifice is relevant to the subjective strength of the emotional bond felt by the sponsor now. The manner in which the family came to be separated is relevant to the assessment of family life and whether separation breaks previous family bonds. Statute requires us to look at circumstances as at the date of decision. However, this cannot be dealt with in isolation and a raft of factors need to be taken into account, such as when and with whom the appellant has resided in the past. The appellant has not formed a family of his own which would be a powerful factor to indicate independence had he done so. It is trite law that separation does not bring family life to an end. It is

necessary to examine the sacrifices made by someone in the position of the father. There is the subjective strength that he feels because of his hopes and wishes to have all of his family around him in his old age. There is the additional factor of blindness and the requirement to be looked after by others. This goes to proportionality, however, and not to the existence of family life.

25. On the causation issue the Court of Appeal in **Gurung** held itself bound by **Patel**. There is nothing to suggest that the father's status may be revoked, or that there is any adverse information regarding the appellant. As per **Gurung** any distinction between his position and that of the BOC dependants in **Patel** is therefore of little weight. The approach in **Patel** is based on causation. The injustice causes a compensatory principle to operate. For the sponsor the historical injustice lasted until 2009. Although in the error of law judgment at paragraph 17 there was said to be no evidence that the father took steps after 2004 when there was the discretionary policy for Gurkhas from which he might have benefited, the fact is that had he taken advice in 2004 he would have been told he could not benefit from the then Rules and policy. Nothing would have helped him until 2009 when the injustice was corrected, but by then the appellant was already over 18. Looking at **Patel** the test of causation is wider than in **Gurung** and it is not necessary for the appellant to have been born during the father's service. At paragraph 13 of **Patel** Sedley LJ notes that:-

> "Appellants – the present ones included - are typically children who, but for their parents' legal inability to settle here between 1968 and 2002, would have either been born here or have come as minors in right of their parents."

Although that judgment related to BOCs there cannot be one rule for Gurkhas and one for BOCs. The uncontroverted evidence of the father was that he would have settled in the UK at the first opportunity had there been a mechanism by which he could do so, or words to that effect. Although accepting that the terms of the Rules must be taken into account they are relevant but not determinative of the outcome of an appeal. He did not seek to go behind the recent cases of **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640** and **Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC).**

26. As to maintenance the father's indigence is a consequence of the historic injustice. None of the Rules or policies that govern applications by former members of the Armed Forces require proof of ability to be adequately maintained or accommodated other than those that concern children, which is for their protection, not that of the public purse. The policy is consistent with the Military Covenant and the recognition of the sacrifices that service entails. Had the father been granted settlement when he was discharged from the Brigade in 1971 he would have been entitled to work and his army record suggests he would have found gainful employment. In **Gurung** [41] the court held that the consequences of the historic injustice are such that it is a strong reason that Article 8(1) rights should be vindicated, notwithstanding the potency of the countervailing public interest in the maintenance of a firm immigration policy. In **Ghising [2013]** the Upper Tribunal clarified this point as indicating that unless the respondent relies on something more than the public

interest the weight to be given to the historic injustice will normally require a decision in the appellant's favour. The weight to be given to any burden that the appellant may pose to public funds is diminished by the analysis of causation in that had the appellant's father not been wronged it is more likely than not that he would not require any such support from public funds and he would in any event be entitled to it if he did. The potential risk to public funds is insufficient to tip the balance back in the respondent's favour and the appellant should be put in the position he would have been but for the wrong.

27. Mr Wilding made no response to these submissions.

Article 8(1) – Family Life

28. Paragraph 46 of **Gurung** makes reference to paragraphs 50 to 62 of the Upper Tribunal's decision in **Ghising [2012]** where family life is discussed and says that it contains a useful review of some of the jurisprudence and the correct approach to be adopted. The conclusion at paragraph 62 of **Ghising [2012]** is that "the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

29. The appellant bears the burden of proof of establishing that Article 8 is engaged. The facts in this appeal are not in issue as to the circumstances pertaining in relation to all family members at the relevant dates of application. It may be in the papers somewhere but I have not been able to ascertain the date that the appellant submitted his first application for entry clearance. He says that the application was made at the same time as his father's one. Self-evidently therefore it was made some time prior to the grant of settlement for the father on 3/5/2010. The appellant's first application was refused a few months later on 24/9/2010, according to his statement.

30. The appellant did not appeal that decision at that time and preferred to make a later application as explained in answer to questions at 40-42 of the telephone interview. The appellant's mother and siblings were granted entry clearance and came to settle in the United Kingdom leaving the appellant on his own for more than a year prior to him making a renewed application. According to the appellant, when he did make his application he used money from his father's pension to pay the visa fee. His father says that after saving the required monies he sent the application fee to his son. Those statements are not necessarily contradictory. The reason given for the delay in making the application was lack of funds.

31. The appellant moved to Kathmandu of his own volition and moved in with and may still live with his cousin there. At date of decision, which is the relevant date, he was studying and sharing the cooking and cleaning with that cousin. He has a computer at home and an e-mail address, and contacts his parents once a day through Skype and Facebook. He watches TV, goes to church and has a social network of friends. If he comes to the United Kingdom he will try to go "in hotel line" as a waiter or driver. There is in the documentation a letter from the Gurkha Welfare Scheme, Area Welfare Centre, confirming that the appellant is able to collect his father's pension. What he receives in this way provides him with sufficient upon which to live, I can

assume. The telephone interview with the appellant indicates that the father's army pension is around Rs.27,000 NPR and the appellant uses all of that money. When asked if "they" send money to him, and if so how much and how often, the appellant responded "No, they use (sic) to send only at the time of need through IME Money Exchange according to requirement". The father and his family in the United Kingdom receive benefits and it is those benefits that provide the family with its income.

32. The appellant receives his father's army pension and to that extent therefore he is economically dependent upon his father for his ability to live. I was not addressed as to whether the father and his family would receive more net income were the pension to be paid to the father here or receipt of that pension would merely lead to a reduction in the benefits that the family received.

Findings on the Engagement of Article 8(1) Family Life

33. The father says that he applied for settlement originally together with the appellant because he needed the appellant's physical support. Those applications were made before the remainder of the family made their applications. Whereas I understand the point that the appellant was refused entry clearance previously because he applied before his mother and brother and that was why he did not appeal, it is not clear to me why he did not make the further application at the same time as they made their applications. It seems unlikely that inability to pay the application fee explains the delay unless it was shown that it was not possible to raise the fee by one means or another from family members or others, perhaps by way of a loan. Also, without further explanation it is difficult to accept that it took in the region of two years to provide "enough documents about my father health condition, education certificates and I have provided a reference letter from pension welfare office that I am using my father pension".

34. The uncontroverted evidence in the father's statement is that the appellant's siblings are "being separated" from their elder brother and that they are a very close family. The continued separation is said to be causing suffering to all the family and is "breaking" the tight family unit. The father and his wife are under great stress without the appellant.

35. Having applied the appropriate burden and standard of proof I come to the finding that there is family life between the appellant and his parents and siblings in the UK. As per paragraph 62 of **Ghising** the different outcomes in cases with superficially similar features emphasises that the issue under Article 8(1) is highly fact-sensitive. In essence I make the finding that there is family life for many reasons. The original intention of the family was, I find, that the appellant would come to the UK with his father. This is because they applied at the same time to settle and before the other members of the family did so. As the eldest child the appellant would be best placed to look after his father in the short-term by helping him get around and taking him to appointments etc. as he had done in Nepal. In **Ghising** the evidence was that it is the custom among Nepalese people for the youngest son to remain living with his

parents, even after marriage, to care for them when they become elderly. That evidence was not challenged by the respondent. The father's younger son was too young to carry out that function when he was in Nepal and therefore there is no reason to doubt that the appellant himself took on that role. The appellant can write and read English but has trouble speaking it, so it is unclear to me how much help he would have been, but the intention that he would aid his father existed. When it became clear through the refusal of the appellant's application that he would not be going with his father, applications were made for the father's wife and children, their applications were granted and they came as a family leaving the appellant behind. Although the appellant made the decision to move out of the village and live with his cousin in Kathmandu and he receives the whole of his income through his father, it has always been the family's intention that the appellant should join his family in the UK and they have only been frustrated in that aim by the inability of the appellant to obtain entry clearance. It was the family's intention that the separation would only be temporary.

36. Further evidence that there is family life such as engages Article 8 (1) is also provided by the fact that the appellant relies financially upon his father to provide income albeit that the income is provided by means of the father's army pension and/or benefits received by the family in the United Kingdom. Although there are some matters that point to the appellant's independence at or around the date of decision in that he had moved to Kathmandu to live in his uncle's home renting a room with his cousin. He was still studying at school despite his age and did not have a partner or any children. There is no reason to doubt that the contact between the appellant and family is very regular by means of Skype and Facebook – the appellant says daily contact.

37. My conclusion is that although the family bonds may have been stretched by the passage of time they have not been severed and amount, for the above reasons, to family life over and above what might normally be expected between adult family members.

Article 8(2) consideration

38. Having established that Article 8 is engaged the respondent bears the burden of proving that the interference is justified under Article 8(2). There appears to be no issue that the respondent can lawfully refuse the appellant leave to enter and therefore the decision is "in accordance with the law" within the meaning of Article 8(2). It is not in dispute either that the respondent's policy of immigration control in general is a legitimate aim in the interests of the economic wellbeing of the country and as is set out in paragraph 80 of **Ghising** the public interest in a firm and fair system of immigration control is considerable. However, in this appeal as with many others relating to Gurkhas and their families, the appellant in essence submits that a fair and firm system of immigration control carries less weight because it has to be balanced against the recognition that the Government's past immigration policy in respect of Gurkha veterans and their families was unjust.

39. The father says at paragraph 15 of his statement that had he been allowed to apply for settlement in the UK upon his army discharge (in 1971) he would have applied together with his family. However, he was never given the opportunity until recently. As has been observed earlier in this determination and upon the error of law hearing that statement was not challenged. Although we made reference to the fact that there is no evidence that the father took steps to seek entry clearance after 2004 when the discretionary policy came into being, the fact is that had he applied he would have failed inevitably if for no other reason than that he was not discharged from the Gurkha Brigade until after 1997. Although that it is not a complete answer to the point that we made, it is one which in my finding leads me to conclude that the earliest possible date that the father could have applied was at about the time he actually did so in late 2009 or early 2010.

40. As to the causation point, Lord Dyson in paragraph 42 of **Gurung** had this to say:-

> "It follows that we do not accept the submission of Mr Drabble that the weight to be given to the historic injustice in the Gurkha cases is just as strong as the weight to be given to the injustice caused to the BOCs. The fact that the right to settle enjoyed by Gurkhas is less secure than that enjoyed by the BOCs is a relevant factor. But it also follows that we do not agree with the UT that the weight to be given is generally 'substantially less' in the Gurkha cases. *If a Gurkha can show that, but for the historic injustice, he would have settled in the UK at a time when his dependant (now) adult child would have been able to accompany him as a dependant child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now*. To that extent, the Gurkha and BOC cases are similar. That is why we cannot agree that, as a general rule, the weight accorded to the injustice should be substantially different in the two cases." (My italics.)

It is clear there that Lord Dyson was referring to those adult children being children that had already been born, hence that the Gurkha would have settled when his dependent child would have been able to accompany him. He did not refer specifically to the position of those children that were not born and who therefore would not have been able to accompany him.

41. However, in paragraphs 13-15 of **Patel** Sedley LJ said the following:-

> "13. Thus in **NH (India)**, where it was the mother who had been excluded and had finally secured British citizenship, this court held that the history was material to the question of proportionality; the fact that the father could meanwhile have sought entry by voucher played no part in the argument. It needs to be remembered that what is at issue in these cases is not reuniting a family which was divided by the 1968 Act: far too much time has gone by for that to matter save in the rarest cases. Appellants – the present ones included - are typically children who, but for their parents' legal inability to settle here between 1968 and 2002, would have either been born here or have come as minors in right of their parents.

> 14. 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 Article 8 will have no purchase. But what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children – including children on whom the parents themselves are now reliant – may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right. That is what gives the historical wrong a potential relevance to Article 8 claims such as these. It does not make the Convention a mechanism for turning the clock back, but it does make both the history and its admitted injustices potentially relevant to the application of Article 8(2).
>
> 15. As the individual cases to which I now turn illustrate, the effect of this is to reverse the usual balance of Article 8 issues. By the time they come to seek entry clearance, adult children may well no longer be part of the family life of British overseas citizens who have finally secured British citizenship. If so, the threshold of Article 8(1) will not have been crossed and the proportionality of excluding them will not be an issue. If, however, they come within the protection of Article 8(1), the balance of factors determining proportionality for the purposes of Article 8(2) will be influenced, perhaps decisively, by the fact (if it is a fact) that, but for the history recounted in **NH (India)**, the family would or might have settled here long ago."

42. It seems to me that Sedley LJ had in mind just such a situation as exists in the present case. We are dealing with facts and not speculation. Had the father settled here many moons ago soon after his discharge from the Brigade of Gurkhas he may not have met his current wife or had the children that he has. There would have been no application to make. The certainty, however, is that he did marry and but for the historic injustice would have settled here when he was able to. That means that he would have done so at a time when the appellant had not been thought of or if he had by then been born he would have been a dependant of his father and entitled to settle with him. Although we were concerned at the error of law hearing as we set out in paragraphs 15 to 17 of our determination, the inescapable conclusion is that had the continuing injustice been corrected at any time prior to the appellant's birth he would have been born in the United Kingdom, and had it been corrected at any time during his minority he would have been entitled to settle along with his father.

43. After further argument and consideration therefore, although it cannot have been the father's intention to settle with the yet, as unborn appellant, he is entitled to have taken into account in the balance of factors determining proportionality the historic injustice to his father, which injustice continued until such time as his father was granted entry clearance.

The Relevant Immigration Rules

44. I turn now to the Immigration Rules pertaining to an application of this type. The appellant is applying for entry clearance as an adult dependent relative. Section EC-DR of Appendix FM to the Rules set out the requirements to be met for entry clearance as an adult dependent relative. The appellant is outside the UK and has made a valid application for entry clearance. He does not fall for refusal on the grounds of suitability. He has no convictions and has not behaved in any way that could lead to a refusal under such a requirement. He was refused because he did not meet the requirements of EC-DR1.1(d), those requirements being set out in Section E-ECDR "eligibility for entry clearance as an adult dependent relative". Then at E-ECDR1.1 reference is made to having to meet the eligibility requirements of paragraphs E-ECDR.2.1 to 3.2.

45. Applying the appellant's circumstances to the rules he is the overage son of the father (the sponsor) who is present and settled in the UK. The appellant does not as a result of age, illness or disability require long-term personal care to perform everyday tasks and therefore does not meet the requirements of E-ECDR.2.4. The appellant has not provided evidence that he can be adequately maintained, accommodated and cared for in the UK by the sponsor without recourse to public funds (E-ECDR.3.1). Refusal was also on the basis that although a tenancy agreement was submitted there was no independently verifiable evidence that the father is the sole occupier and no evidence from an independent property inspection report to confirm the size and suitability of the accommodation. Because of this the Entry Clearance Officer was not in a position to make a judgment as to whether the property would become statutorily overcrowded were the appellant additionally to live there. This triggered a refusal under E-ECP.3.4.

The Immigration Departmental Instructions (IDIs)

46. The IDIs Chapter 15, Sec. 2A para 13.2 and Annexes A and B which were updated in March 2010, and are therefore applicable to this application, set out the policy referring to the exercise of discretion in the case of adult children. The force of the IDIs is that dependants over the age of 18 who are not otherwise covered in the Guidance would normally need to qualify for settlement in the UK under a specific provision of the Immigration Rules.

47. It is not in dispute that the appellant does not meet the specific provision of the Rules which in his case would be under paragraph 317. The IDIs proceed by stating that in exceptional circumstances discretion may be exercised in individual cases where the dependant is over the age of 18. Annex A sets out the discretionary arrangements for former Gurkhas discharged before 1 July 1997 and states that the scheme recognises the unique nature of the service given by the Brigade of Gurkhas and is offered to them alone on an exceptional basis. It applies to those who served in the Brigade of Gurkhas from January 1948 when it became part of the British Army. It goes on to state that settlement applications from those former members of the Brigade of Gurkhas will normally be approved provided that they served for at least four years

in the Brigade and there is no adverse information about them, for instance, any evidence of any serious criminal activity. Discretion will then normally be exercised and settlement granted in line with the main applicant for spouses, civil partners, unmarried and same sex partners and dependent children under the age of 18. Then:-

> "Children over the age of 18 and other dependent relatives will not normally qualify for the exercise of discretion in line with the main applicant and will be expected to qualify for leave to enter or remain in the UK under the relevant provisions of the Immigration Rules, for example under paragraph 317, or under the provisions of Article 8 of the Human Rights Act. Exceptional circumstances may be considered on a case by case basis. For more information on the exceptional circumstances in which discretion may be exercised see Section 13.2."

48. However, the current version of Section 13.2 does not have information or examples of what exceptional circumstances may be that would lead to discretion being exercised. The earlier version of Section 13.2 is in almost identical terms save that it contains a list of five factors to which consideration should be given in assessing whether settlement in the UK is appropriate. As was noted at paragraph 10 of **Gurung** no explanation has been given to the court as to why this list was omitted from the March 2010 version.

49. As was further noted by paragraph 11 of **Gurung** the policy should be considered against the background of the Rules. Paragraphs 276E to K of the Rules are specific to Gurkhas themselves and Rule 317 sets out the requirements for the grant of indefinite leave to enter or remain to any applicant as the parent, grandparent or other dependent relative of a person present and settled in the UK. These requirements include that the applicant:-

> "(i) is related to a person present and settled in the United Kingdom in one of the following ways ...
>
> (f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom".

50. There is no doubt in my mind that the historic injustice is a relevant factor to be taken into account when undertaking the proportionality balancing exercise. The difficulty is in deciding what weight should be given to it. In **Gurung** it was accepted by the court that the historic injustice is only one of the factors to be weighed against the need to maintain a firm and fair 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.

51. There is much discussion in the later paragraphs in **Gurung** as to what differences there may be between the BOC cases given the fact that BOC parents who suffered

historical injustice were British citizens, whereas Gurkhas are nationals of Nepal (it being a condition of their service that they remain Nepalese citizens throughout their service in the British Army) or that BOC parents had or should have had an absolute and indefeasible right as British citizens to settle in the UK, whereas Gurkhas are required to apply to settle here. Further, the injustice suffered by the BOC parents was particularly grave involving racially and then sexually discriminatory schemes to their detriment, whereas no equivalent injustice has been suffered by the Gurkhas.

52. At paragraph 42 of **Gurung** the fact that the right to settle enjoyed by Gurkhas is less secure than that enjoyed by the BOCs is a relevant factor. However, the court found that it followed that it did not agree with the Upper Tribunal that the weight to be given is generally "substantially less" in the Gurkha cases. It then went on to state that if a Gurkha can show that but for the historic injustice he would have settled in the UK at a time when his dependent (now) adult child would have been able to accompany him as a dependent child under the age of 18, that is a strong reason for holding that it is proportionate to permit the adult child to join his family now. That is as previously stated earlier in this determination. So, the historic injustice carries weight and of course was the reason why the Immigration Rules and policy were framed in relation to Gurkhas and their families as they have been. However, it is also the position that the Rules and policy have been framed to require that in the case of adult dependent children there have to be exceptional circumstances before an applicant is able to succeed.

53. In the proportionality exercise under Article 8(2) all factors have to be taken into account such as the historic injustice and the need for fair and firm immigration control. I have referred earlier in this determination to the passage of time and the fact that for almost half the time since the father left the Gurkhas any intention on his part to settle here would not have been an intention to settle with the appellant, who was not yet born.

54. I have found that there is family life for the reasons already given. The appellant is apparently fit and healthy. He has no disabilities and is being maintained by his father to complete his education. Once that education has been completed there may well be employment opportunities for him. He is living in a property with a cousin. That property appears to have all the standard amenities.

55. It is for the respondent to prove that the decision is proportionate. I have considered the maintenance and accommodation points. I note that maintenance and accommodation is not normally required for military applications and that can be well-understood in relation to Forces' members and their families, but these by definition would be members as defined and would not include adult dependent children. Although Mr Jesurum argues that if the father had been granted settlement following discharge from the Brigade in 1971 he would have been entitled to work and his army record suggests he would have found gainful employment I find that argument is too speculative having considered that more than 40 years have passed since his discharge. Thus I am unable to conclude that the historic injustice is an

operating factor in the father's indigence now and his inability to meet the accommodation requirements.

56. I have considered the Article 8 rights of the appellant's parents and siblings. There is no great detail but as one could well expect they wish the appellant to join them here. There is no challenge to the evidence of the father that they were a close knit family in Nepal and that separation is causing suffering and distress to the family. There is little reason to doubt that the added support of the appellant would be helpful to the father even if the father has the added support in the United Kingdom from the Gurkha community. The father has his wife with him who is considerably younger than he is. There is no evidence that she has any health problems. Although she is said to be illiterate there is little reason to suppose that she is not of support to him. The children were young at date of decision but would not have been entirely unable to help their father and mother and would presumably have been educated in English so that language difficulties would be less of a problem than otherwise might be the case.

57. There is a raft of recent cases in relation to Article 8 and the new Immigration Rules. Suffice to say that the Rules themselves set out a complete code, but the discretionary policy in relation to the Gurkhas itself refers to the need for there to be exceptional circumstances for an adult dependent child of a Gurkha.

58. What exceptional circumstances therefore apply? As was said in paragraph 41 of **Gurung**, in the discussion concerning the suffering by Gurkhas as compared with that suffered by the BOCs, the crucial point is that there was a historic injustice in both cases and the comment was then made that this is why the historic injustice is such an important factor to be taken into account in the balancing exercise and why the applicant dependent child of a Gurkha who has settled in the UK has such a strong claim to have his Article 8(1) right vindicated notwithstanding the potency of a countervailing public interest in the maintaining of a firm immigration policy.

59. In a discussion in **Ghising and others (Gurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)** at paragraph 59 onwards there was discussion in relation to that paragraph in the Court of Appeal decision in **Gurung**. The historic injustice issue will carry significant weight on the appellant's side of the balance and is likely to outweigh the matters relied on by the respondent where these consist solely of the public interest in maintaining a firm immigration policy. As is said in paragraph 60 of **Ghising** however, 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). Examples are then given. The point is made that 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. That paragraph concludes that:-

> "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."

That appeal was an appeal decided on its own particular facts which were that the appellant in that case was born whilst his father was still serving in the Brigade of Gurkhas. He had come to this country in 2007 as a student and his parents were granted indefinite leave in 2009 following the changes in the eligibility rules for Gurkhas themselves, but the point is made that the historic injustice carries significant weight.

60. This is finely balanced. In most cases the requirement of firm and fair immigration control outweighs the respect due to family life but that requirement may be outweighed by the weight to be given to that family life where there has been historic injustice. The clock cannot be turned back to allow those family members who now have their own families or lead independent lives to come to the United Kingdom following the righting of the historic injustice. The converse is true, however, that those who do not have their own families or have not yet otherwise formed an independent life have in their favour the historic injustice suffered by their fathers. The weight to be given to that matter is significant as discussed in **Ghising** and **Gurung**. In this appeal the respondent cannot point to matters over and above the public interest in maintaining a firm immigration policy to support the refusal of leave to enter. That policy in the particular circumstances of this appeal is not sufficient to show that the decision to refuse entry clearance is proportionate. There is family life that engages Article 8(1) and but for the historic injustice the appeal would fail under Article 8 (2). As it is this appellant succeeds because the historic injustice suffered by the father carries more weight than the applicable immigration policy and the appellant benefits accordingly. It is the historic injustice that makes the circumstances exceptional.

Decision

61. This is an appeal where the First-tier Tribunal judge erred in law for the reasons given. Viewed in the round and after a thorough examination of the particular circumstances I have found that there is family life under Article 8(1) ECHR and that the decision of the respondent to refuse the appellant entry clearance is disproportionate to the legitimate aim sought to be achieved. Therefore the appellant succeeds under Article 8(2).

62. The decision of the First-tier Tribunal Judge has been set aside but for different reasons the appeal is allowed.

63. No anonymity direction has been sought or made previously and in day particular circumstances of this appeal I see no need to make one.

Signed Date

Upper Tribunal Judge Pinkerton