Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/01736/2014
OA/01742/2014

THE IMMIGRATION ACTS

Heard at: Field House
on 5 October 2015

Decision and Reasons
Promulgated
on 30 December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS TIJ MAYA GURUNG
MR PRAKASH GURUNG
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr R Jesurum, counsel (instructed by Howe and Co)
For the Respondent: Ms E Savage, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are both nationals of Nepal, born on 26 August 1967 and 17 August 1989 respectively. They appeal with permission to the Upper Tribunal against the decision of the First-tier Tribunal, promulgated on 9 April 2015 dismissing their appeal on human rights grounds. It was accepted before the First-tier Tribunal that the appellants' applications could not satisfy the requirements of the immigration rules. The applications had not been made under the rules.

2. In granting the appellants permission to appeal, First-tier Tribunal Judge Colyer found with regard to the first appellant that it was arguable that the Judge's interpretation and application of the facts resulted in his proceeding on a wrong

factual footing. With regard to the second appellant, it was arguable that the Judge was bound to follow the approach to historic injustice cases laid down in Ghising and Others (Gurkhas/BOCs/Historical Wrong/Weight) [2013] UKUT 567 (IAC).

Jurisdiction

3. The First-tier Immigration Judge found at [20] that the appellants do not have a limited right of appeal under s.84(1)(c) of the 2002 Act "...but can deploy the full gambit of appeal grounds set out in s.84".

4. Before the Upper Tribunal Ms Savage on behalf of the respondent initially contended that the appellants' right of appeal was confined to grounds referred to in s.84(1)(b)(c) and (g) of the Nationality, Immigration and Asylum Act 2002. Accordingly, the First-tier Tribunal did not have jurisdiction to consider a ground of appeal under s.84(1)(e) and, therefore, ground 1 of the appellants' grounds of appeal did not identify any relevant error of law.

5. On behalf of the appellants, Mr Jesurum submitted that there was jurisdiction to entertain a s.84(1)(e) ground of appeal. The decision in respect of the first appellant is accordingly 'otherwise not in accordance with the law'. Moreover in respect of both appellants, he contended that there is an error of law relating to the Article 8 appeal.

6. Ms Savage eventually conceded that the Tribunal did in fact have jurisdiction to consider a claim under s.84(1)(e) of theb2002 Act, but contended that having regard to the merits of their appeals, the decision of the First-tier Tribunal did not disclose any material error of law.

The background facts and assertions before the First-tier Tribunal

7. It was accepted that the sponsor is the husband of the first appellant and father of the second. The sponsor served in the Gurkhas Brigade for over 15 years. He was discharged in 1996. He had an exemplary record of conduct.

8. It was contended that he had been unjustly denied any opportunity to apply to settle in the UK, which injustice was only fully corrected in 2009. At that stage, the second appellant was already 18 years old.

9. The sponsor was granted settlement in 2013 under the policy for Gurkha veterans promulgated in 2009. It was contended that had the injustice not occurred, the sponsor would have been granted settlement in 1996 resulting in the first appellant's entitlement to accompany him as his spouse and the second as his minor dependant. The respondent's unjust act was the only reason why they were not already in the UK.

10. The appellants applied for indefinite leave to enter the UK to accompany the sponsor in order to settle as a family. The application was made outside the rules under the policy set out in the Immigration Directorate Instructions at Chapter 15, section 2A, annex A. The application was refused on 3 December 2013.

The First-tier tribunal's findings

11. The First-tier Immigration Judge found at [59] and [60] that the appellants could not meet the requirements of paragraph 276R(i) of the Immigration Rules.

12. In a detailed decision, the Judge found at [65] that the appellants live together in Nepal with the mother of the sponsor. There are "issues of financial dependency" in relation to both appellants, whose livelihoods depend upon income sent by the sponsor/father from his work in the Gurkha reserve unit in Brunei. Taking those matters together, he found that there was an Article 8 claim to family life and that there was an interference of such gravity as to engage the application of Article 8 [65 and 66].

13. He sought to distinguish R (Gurung) and others v SSHD [2013] 1 WLR 2546, on the basis that in Gurung the dependent child applicant was settled in the UK [69]. The two appellants in this appeal are not in the UK and have never visited the UK.

14. He was satisfied, taking account of various matters set out in his decision, that the interference involved in refusing entry to the UK would be proportionate to the legitimate public ends sought to be achieved by the public authority in maintaining a fair and efficient immigration policy [75].

15. He accordingly dismissed their appeals "under human rights."

Submissions

16. As already noted it is now accepted that the first appellant can raise a ground of appeal under section 85(1)(e) of the 2002 Act.

17. Mr Jesurun submitted that the policy in the IDI, Chapter 15, section 2A, Annex A is in presumptive terms, so that discretion will normally be exercised and settlement granted in line with the main applicant for spouses. The first appellant was entitled to benefit under the policy. That issue was however not examined.

18. Further, the Judge misdirected himself as to the terms of the policy, finding at [61] that it required exceptionality, whereas the policy applicable to the first appellant does not. Nor did the policy require anyone to be physically present in the UK. The clear words of the policy are that settlement will be "normally" granted "in line"[1].

19. That policy, he submitted, creates a presumption (AG and others (policies – executive discretions – Tribunal's powers) Kosovo [2007] UKAIT 00082 at [50]) and

1 'Discretion will normally be exercised and settlement granted in line with the main applicant for spouses.....'.

entitles the Tribunal to substitute its view if the precise terms are proved, and there is nothing at all to displace the presumption, or nothing that, under the terms of the policy falls for consideration. If these factors apply the appeal should be allowed.

20. The fact that the sponsor has not taken up settlement is not a matter that under the terms of the policy displaces the presumption. Nor is it a matter that would allow a rational decision maker in possession of the information and evidence submitted, to conclude that the "normal" course should not be followed. Mr Jesurum submitted that the sponsor is a man of good character who was regarded by his commanding officer as trustworthy. His evidence as set out in his witness statement that he intended to resign his position in order to take up settlement and travel to the UK with his wife and son, should be treated as credible. That was a point also made in the covering letter of his solicitors which accompanied the second appellant's application.

21. He also submitted that the Judge failed to apply the historic injustice case law. He contended that the Judge wrongly distinguished R (Gurung), supra, on the basis that 'the child applicant' in Gurung was settled in the UK. That however is inaccurate: Some of the appellants were, and several who succeeded (KR, CR and YR) were not so settled. The reason given was thus factually incorrect and cannot therefore be sustained. In any event, it was irrelevant to the ratio of Gurung at [40-43], and is based on causation, historic injustice and a "but for" test, and not on ties to the UK. The Judge was bound by Gurung and failed to apply it.

22. He further submitted at paragraph 11 of his grounds that Judge approached proportionality on the wrong factual basis: had he properly considered the first appellant's case, he should have examined it on the basis of the sponsor and the first appellant being admitted to the UK, causing the separation between cohabiting mother and son; and if not, he should have examined the proportionality of interference with the family life of the husband and wife '….whom the refusal would separate.'

23. The Judge was bound by Ghising and others (Ghurkas) BOCs – historic wrong – weight) [2013] UKUT 567 (IAC) at [60] . This was a case where the only matter relied on by the respondent was the ordinary interests of immigration control

24. In Ghising, the Tribunal stated at [60] -

"...in other words, 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 just described.

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 that they would have come to the UK 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 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 in Gurung, then the weight to be given to the historic injustice will normally require a decision in the appellant's favour."

25. The Judge failed to follow that approach applicable to historical injustice cases and accordingly erred.

26. Mr Jesurum submitted that the Judge erred in relation to Article 8. He made a clear finding of family life at [65], also finding that the interference proposed would have such gravity to engage the operation of Article 8 [66]. There has been no cross appeal against those findings and they accordingly stand.

27. He referred to the Judge's observations at [71] and [73]. At [71] the Judge stated that it was the case that the sponsor has not lived with the two appellants in Nepal apart from annual vacation visits. Having made the decision to seek work to provide a higher standard of living, it is nevertheless a consequence that he spent less time with his wife and two children and mother. The Judge found the appellant's claim to family life was accordingly undermined by the considerable period of time they spent apart from the sponsor.

28. At [73] the Judge stated that there is also the issue that the second appellant is an adult. He was born in August 1989 and was aged 24 at the date of the decision. He regarded the test of Article 8 family life in this case to be whether more exists than normal emotional ties. The other son had lived with his mother in the family home but there is no evidence that this is dependence rather than convenience.

29. Mr Jesurum submitted that the observations in those two paragraphs appear to be directed to the issue of proportionality rather than whether or not Article 8(1) is engaged. Moreover, paragraph [73] addresses the second appellant alone. The word "undermined" used by the Judge is not sufficiently clear to reverse the clear finding at [65] and [66] that family life does exist. This suggests weakening rather than displacement, reversal or failure. However, if the observations at [71] and [73] do constitute a reversal of findings from [65] and [66] that in itself amounts to an error as there would be an internally contradictory and unclear set of findings.

30. He also contended that the Judge failed to apply the case law brought to his attention, including R (Gurung), supra, at 40-43. The Judge found that the second appellant, who is aged 24 is an adult and there is no evidence that this is dependence rather than a matter of convenience. However, family life can exist without dependence – Patel and Others v ECO (Mumbai) [2010] EWCA Civ 17 at [14] and Ghising.

31. At [42] in Gurung, supra, the Court of Appeal stated 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 admit the adult child to join his family now.

32. The Court of Appeal also rejected the reason given by the Tribunal for holding that the weight to be given to the historic injustice 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. 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 the balance.

33. Mr Jesurum also relied in this regard on Patel and Others, supra, at [13]-[15] and Ghising, 2013, supra, at [59]-[60]. I have already quoted from that judgement where the Tribunal stated that if the respondent can point to matters over and above the public interest in maintaining a firm and fair immigration policy, which would include a bad immigration history and/or criminal behaviour, this still might be sufficient to outweigh the powerful factors bearing on the appellant's side.

34. Ms Savage on behalf of the respondent produced the archives relating to the definition of "present and settled" in the immigration Rules, which means that the person concerned is settled in the UK and at the time that an application under these rules is made, is physically present here or is coming here with, or to join the applicant and intends to make the UK their home with the applicant if their application is successful. She submitted that the sponsor has not satisfied the definitional requirements, entitling the appellants to benefit therefrom.

35. With regard to the first ground of appeal, Ms Savage submitted that any error identified in this ground is immaterial. The assertion had been that the refusal decision was not in accordance with the law as being irrational. She submitted that the decision was in accordance with the law and cannot be said to be irrational.

36. She submitted that the respondent properly considered the discretionary guidance for spouses of ex-Gurkhas in the IDIs, chapter 15, section 2A, annex A. The respondent was not satisfied that discretion should be exercised in the first appellant's favour. That was on the basis that the sponsor was not present and settled in the UK.

37. She submitted that in any event the presumption in the policy that discretion will normally be exercised and settlement granted in line with the main applicant for spouses, is dependent on any leave being granted to the spouse being "in line" with leave granted to the main applicant. Here, however, the sponsor's wife is not applying for settlement at the same time as, and in line with, her sponsor. Nor is she joining the sponsor. The sponsor had not activated his visa and was not present and settled here.

38. With regard to the second ground, she submitted that none of the points raised disclosed any material error of law. Whilst accepting that the First-tier Tribunal Judge wrongly distinguished Gurung, she submitted that such error is immaterial.

39. She submitted following the Rule 24 reply, that in Article 8 entry clearance appeals, the relevant date is the date of decision. Accordingly, s.85(5) of the 2002 Act excludes consideration at appeal of matters arising after the decision to refuse entry clearance. The Judge was accordingly obliged to consider circumstances as at the date of decision, namely 3 December 2013.

40. At that date, the sponsor had not activated his visa and was not present and settled here. He was residing in Brunei whilst the appellants lived in Nepal. Accordingly the refusal of entry clearance would have had no impact, let alone a disproportionate impact, on the appellants' right to family life with the sponsor. The decision did not demonstrate any lack of respect for family life. The sponsor was not present and settled here at the date of decision and the grant of settlement to the appellant here would not have resulted in the reunification of the family unit.

41. With regard to the "historic wrong" she submitted that in accordance with Ghising, supra, the appellants have not demonstrated that but for that wrong, they would have been settled in the UK long ago. In this case the sponsor was issued with a visa in February 2013 but did not arrive in the UK until February 2015. The sponsor has been in the UK for a short time despite having the option of coming to the UK since the grant of indefinite leave to enter in February 2014 [74]. That undermines the sponsor's claim that he would have been settled in the UK long ago had it not been for the historic wrong.

42. Accordingly any error in respect of Article 8 is immaterial.

43. In reply, Mr Jesurum submitted that even if being settled in the UK is part of the requirements under the rules, the policy itself does not require the person to be present and settled here. Annex A is enacted in order to avoid an injustice.

44. With regard to dependants, discretion will normally be exercised in settlement being granted in line with the main applicant for spouses. The purpose of Annex A is to correct a historical injustice. There is therefore no requirement under the policy for the sponsor to be settled at all. Under the annex, the first appellant was entitled to settlement granted in line with the spouse. There is no condition precedent that he must have settled here yet.

45. The findings by the Judge at [74] namely that he has only been in the UK a short time and that he has the option to resume family life in Nepal is a reference to proportionality. However, the sponsor stated that he would have settled in the UK on discharge. He had no legal basis or opportunity to apply until 2009. In his witness statement at paragraph 50, dated 17 February 2015 he explicitly stated that had he been allowed to apply for settlement in the UK upon his army discharge, he

would have applied together with his family. However he has never been given the opportunity until recently.

46. Accordingly, but for the injustice, the second appellant would have been here as a minor.

Assessment

47. It was conceded at the outset that the appellant could not meet the rules. However, their applications were made under the policy and pursuant to Article 8. This is evident from the application form has been completed. This is referred to as Appendix 6 (VAF4A November 2012) – former Gurkhas and their dependants.

48. The relevant applicable policy is that contained in IDI chapter 15, section 2A, Annex A relating to discretionary arrangements for former Gurkhas discharged before 1 July 1997. It provides that discretion will normally be exercised in settlement granted in line with the main applicant or, amongst others, spouses. There is also provision regarding children over the age of 18 and other dependant relatives who will not normally qualify for the exercise of discretion in line with the main applicant, who would be expected to qualify for leave to enter or remain in the UK under the relevant provisions of the Immigration Rules, or under the provisions of Article 8 of the Human Rights Act (sic). Exceptional circumstances may be considered on on a case by case basis.

49. It is accepted that the sponsor in this case is the husband of the first appellant and father of the second. He was discharged in 1996 and had an exemplary record of conduct. He served in the Gurkhas Brigade for over 15 years.

50. He was granted settlement in 2013 under the relevant policy. He has however not yet taken up settlement. The "historic injustice" was only finally corrected in 2009. The second appellant had by then turned 18.

51. The sponsor contended that had the injustice not occurred, he would have been granted settlement in 1996. In that case, his wife and son (as a minor dependant) would have been entitled to accompany him.

52. The Judge found that the sponsor had been in the UK for a short time, having arrived as recently as 25 February 2015.

53. The Judge found that the appeal of the first appellant failed because she could not meet the requirements of paragraph 276R(i) [59] even though it was accepted that the application could not meet the rules.

54. It is now accepted by Ms Savage that the Tribunal did have jurisdiction to consider a ground of appeal under s.84(1)(e) of the 2002 Act.

55. The Judge found that it is the case that the policy applies in exceptional circumstances. He described the test as being ".....whether there is anything

exceptional which might warrant in relation to both appellants the exercise of discretionary guidance" [61].

56. However, there was no requirement of "exceptionality" in the policy relied on by the first appellant.

57. It is moreover evident from the first appellant's submissions before the First-tier Tribunal that her argument was not under Article 8 but under s.84(1)(e) of the 2002 Act.

58. Nor did the policy in its terms require any person to be physically present in the UK. It is simply stated in Annex A that discretion will normally be exercised and discretionary leave granted in line with the main applicant for spouses.

59. The Judge went on to find at [61] that there was nothing in the IDIs at chapter 15 that assisted the appellants in seeking to suggest that the exeptionality test had been met.

60. The Judge went on to state at [63] that the main thrust of the two appeals is the contention that the refusal on Article 8 grounds would be disproportionate to the legitimate aim sought to be achieved by the public authority.

61. The Judge was however required to consider the application of the correct policy to the first appellant's case as presented where discretion will normally be exercised and settlement granted in line with the main applicant. There are no other requirements.

62. The Tribunal has the power in respect of the applicable policy to substitute its view once the terms are proved on the facts of the case – AG and others, supra, at [50]. There is nothing under the terms of the policy that displaces the presumption that discretion will normally be exercised in favour of the spouse under the policy.

63. Ms Savage contended that in this case the first appellant is not applying for settlement at the same time and in line with the sponsor. Nor can she be considered to be joining him because as at the date of application and the date of decision, he had not activated his visa and was not present and settled in the UK.

64. However, as already noted, there is nothing in the wording of the policy that requires the sponsor's settlement in the UK as a prerequisite for the successful application by his wife. It is simply provided that settlement applications from former member of the Brigade of Gurkhas who were discharged before July 1 1997, and who had served at least 4 years in the Brigade, will normally be approved. The sponsor had met the prerequisites for his application for settlement being granted.

65. His application for settlement was granted. There is no requirement that the first appellant should apply for settlement at the same time as her husband.

66. I find that the Judge erred in failing to give effect to the policy which was in presumptive terms. No evidence has been adduced that displaces the presumption that settlement should be granted in line with the sponsor.

67. The first appellant's principal argument was not under Article 8 but under s.94(1)(e) of the 2002 Act. The Judge did not consider whether the first appellant was entitled to benefit from the policy with the result that she was deprived of having her case decided on the basis of the policy applicable to her, and which does not require her to show exceptional circumstances.

68. The fact that the sponsor had not taken up settlement did not displace the presumption that the "normal" course should be followed. The sponsor stated in his witness statement dated 17 February 2015 that it is his intention to settle in the UK as soon as possible with his family. Once they have been granted visas he intends to resign his post at the GRU in order to settle in the UK with his family.

69. He also stated that had he been allowed to apply for settlement in the UK on discharge from the army, he would have applied together with his family. He thus claimed to have been denied the opportunity to settle as he would have wished. He was 24 years old when he was discharged. He would at that stage have sought work as a driver or electrician or security guard, enabling him to work for a further 20 to 30 years. As it is, he is currently working in Brunei and often travels to his family when he gets leave or holidays.

70. With regard to the Article 8 claim, the First-tier Tribunal Judge made a clear finding that there is family life and that the decision to refuse the two appellants' leave to enter the UK would amount to an interference with their right to family life. Moreover, he found that the interference would have such gravity so as to engage the operation of Article 8. He stated that the issue to be considered is whether such interference would be proportionate to the legitimate public ends sought to be achieved by the public authority [66]. He had regard to the authorities he had been referred to [67].

71. He went on to find at [71] that the sponsor made a decision to seek work to provide a higher standard of living with the consequence that he spent less time with his wife and two children and mother. The appellants' claims to family life were accordingly 'undermined' by the considerable period of time that they spent apart from him.

72. I do not however find that the Judge sought to reverse his findings at [65] and [66]. I accept Mr Jesurun's submission that the observations in the later paragraphs were directed towards the proportionality of the proposed interference rather than the engagement of Article 8(1) where the Judge found that there was family life that existed.

73. I have also had regard to the issue raised by the Judge at [73] with regard to the second appellant's being an adult. He was 24 years old at the date of decision.

74. The Judge stated that the test for Article 8 family life is whether between adults "something more exists than normal emotional ties." Such ties might exist if dependence can be established and matters such as links, age, place and length of residence and contact need to be considered [73].

75. The Judge found that as he reached the end of his studies, and in the absence of information about unemployment, it is reasonable to expect him to obtain employment and to enter into other living arrangements. He would then be able to sever his dependence on his parents for his living arrangements and for his funding.

76. It is thus evident that the Judge did not find that the second appellant was living an independent life, but confirmed that family life existed.

77. Although the Judge was referred to the case law, which he considered, it is accepted that his attempt to distinguish R(Gurung), supra, was incorrect. Some of the appellants in that case were in the UK but several who succeeded were not. Moreover, Gurung was not based on ties to the UK but on questions such as causation, historic injustice and a "but for" test.

78. Having found that there was family life in the appellants' case, the Judge was bound to follow the approach with regard to historic injustice cases referred to in Ghising as set out at paragraph [24] above.

79. It appears that the respondent was only relying on the usual interests relating to immigration control. She did not consider the weight to be given to the historic injustice referred to in Ghising.

80. The respondent's reasons for refusal in regard to the second appellant do not appear to accept that Article 8 was engaged and the respondent was not satisfied that he had established family life with his parents over and above that between adult child and parents. Nevertheless, the respondent considered that even if it were engaged, the decision is proportionate in the exercise of immigration control.

81. The Tribunal in Ghising found that Kugathas had been interpreted too restrictively in the past [56]. The judgment in Kugathas must accordingly be read in the light of subsequent decisions of the domestic and Strasbourg courts. The Tribunal in Ghising viewed the jurisprudence which disclosed that there is no general proposition that Article 8 of the Human Rights Convention can never be engaged in a family life that is sought to be established between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case must be analysed on its own facts to decide whether or not family life exists within Article 8(1).

82. There were other authorities referred to, the effect of which is that voluntary separation does not end family life – Sen v Netherlands [2003] EHRR 7. Moreover, the attainment of the age of majority does not end family life as already noted

83. The Tribunal referred to R (Zimbabwe) and Another v SSHD [2008] EWCA Civ 826 at [6] where Sedley LJ stated that it would be "unreal" to dispute that the 23 year old appellant enjoyed family life with her parents when she "had lived pretty well continuously with her parents and siblings all her life." The Court of Appeal also found that the second appellant, a 25 year old, enjoyed family life with his parents since he was economically and emotionally a member of his immediate family, all of whom, that is his parents and two sisters, are now lawfully resident in the UK.

84. Family life can exist without dependence: Patel and Others v ECO (Mumbai) [14]. What may constitute an extant family life falls well short of dependency: Sedley LJ stated that you can set out to compensate for a historical wrong, but you do not 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. 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 circumstances, but by long-delayed right.

85. 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).

86. In the present appeal the First-tier Tribunal Judge did have regard to the statement of Lord Dyson in Gurung at [68]. It referred to the importance of historic injustice and the facts to be taken into account in the balancing exercise.

87. The Judge found that the threshold of Article 8(1) afforded the appellant the protection of Article 8(1). Accordingly, he should have considered that the balance of factors determining proportionality for the purpose of Article 8 (2) will be influenced by the fact that, but for the historical wrong, the family would or might have settled here long ago [15].

88. I find that the approach of the Judge with regard to the second appellant as set out at [73] is not consistent with the authorities that applied in this case. Nor is it evident that the Judge sought to give proper effect to them.

89. I have had regard to Ms Savage's submissions in relation to the second appellant that although the Judge wrongly distinguished R (Gurung) this was not material in the circumstances. This is moreover an Article 8 entry clearance appeal and the relevant date is the date of decision, namely 3 December 2013. The sponsor had not activated his visa by then. Accordingly, the refusal of entry clearance would have had no impact on the appellants' rights to enjoy family life with the sponsor. The sponsor only arrived in the UK on 25 February 2015. That was considered by the Judge as having been a quite short time.

90. That, she submitted, undermined the sponsor's claim that he would have been settled in the UK long ago had it not been for the historic wrong. In the circumstances, she submitted that any error in respect of Article 8 is immaterial. There was no disproportionate interference with their Article 8 rights.

91. However, the sponsor had clearly asserted in his witness statement that but for the historic injustice, he would have been in the UK for a period of more than 20 years. He would have exercised his right to come here at that stage. It is accordingly at best speculative on behalf of the respondent to contend that the historic wrong would not have resulted in his coming to settle here long ago.

92. The sponsor has explained in his witness statement that his wife and children remain dependent on him as he is the sole income earner of his family. It was as a result of his inability to settle in the UK after discharge that he obtained work as a security guard in several countries, finally ending in Brunei since 1997.

93. In all the circumstances I find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I thus set it aside and re-make it.

94. In re-making the decision I preserve the Judge's findings on family life which have not been affected by error.

95. In any event, as submitted by Mr Jesurun, the evidence reveals the existence of the marriage between the first appellant and the sponsor, which has remained a subsisting marriage. His wife and children have remained dependent on him. He is the sole income earner in his family. The second appellant continues living with his mother in the family home and has not established independence. He is currently unmarried, unemployed and is studying.

96. I have referred to the authorities establishing that family life with adult children can exist in cases where there are more than the ordinary emotional ties. In this case, the second appellant has remained dependent on his father and has relied on him for financial support in his day to day living as well as his continued education.

97. In any event, from the authorities, including AA v UK [2012] Imm AR 1 the Human Rights Court stated at [49] that an examination of the Court's case law would tend to suggest that the applicant, a young adult of 24, who resides with his mother and has not yet founded a family of his own, can be regarded as having family life.

98. This approach was approved in Ghising and by the Court of Appeal in Singh v SSHD [2015] EWCA Civ 630 at [25].

99. I accordingly find that the appellants have shown that family life persists in this case.

100. I have set out the policy as it applies to the first appellant. I find that there is nothing in its terms requiring the sponsor to have taken up settlement before his wife was entitled to the benefit of the policy. The policy is presumptive. No

evidence has been adduced that displaces the presumption that settlement should be granted in line with the sponsor.

101. I accept the sponsor's evidence that it is his intention to settle in the UK as soon as possible together with his family. Once they have been granted visas, he intends to resign his post in order to settle with them in the UK.

102. Having found that family life exists, I also answer the the next three questions set out by Lord Bingham in Razgar in the affirmative.

103. I accordingly turn to consider whether the decision constitutes a disproportionate interference in the appellants' rights to respect for their family life.

104. In assessing the proportionality of the decision, I take into account 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 child under the age of 18 would have been able to accompany him as a dependent child, that is a strong reason for holding that it is in the circumstances proportionate to permit that adult child to join the family now – R(Gurung), supra, at [42].

105. The sponsor has stated at paragraph 15 of his witness statement that had he been allowed to apply for settlement in the UK on his army discharge, he would have applied together with his family. He was 34 years old at the time. He would therefore have been able to work here for a further 20-30 years. In Patel, supra, at [15] the Court held that if 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) [2006] UKAIT 00085, the family would or might have settled here long ago.

106. I have considered the unchallenged evidence of the sponsor. He is a man of previous positive good character and is regarded as trustworthy. His assertion therefore that he would have wanted to settle on discharge, and most recently in 2006, had he learned of the policy then in force, is plausible and credible. However, he was prevented by the policy that then applied from settling in the UK as he would not have been able to meet the requirement of three years' service in the UK.

107. There is no record of a bad immigration history or any criminal behaviour affecting the balance against the sponsor.

108. Lord Dyson in R(Gurung [2013] 1 WLR at 2566 at [41] found that 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 immgration control.

109. The respondent has not relied on any matter beyond the ordinary interests of immigration control. The weight to be given to the historic injustice will in the

circumstances normally require a decision in the appellants' favour (Ghising, supra, at [60]).

110. The cases of Gurung and Ghising concerned adult children. However, as submitted by Mr Jesurun, there is no reason why that approach should not apply with equal force to the first appellant. Accordingly, but for the injustice she too would have settled in the UK since 1996.

111. I have also had regard in remaking the decision under Article 8 to the public interest considerations referred to in sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002. As noted the ordinary interests of imigration control are normally outweighed by the historic injustice referred to in Ghising.

112. The second appellant has studied some English at school. But for the injustice to his father, he would have settled in the UK when he was 7 years old. His lack of fluency is referable to the respondent's injustice.

113. As far as financial independence is concerned, the policy with regard to the first appellant contains no maintenance and accommodation requirements. Moreover the evidence from the sponsor is that he enjoys sufficient means to ensure that the appellants do not become a burden on public funds and will be properly accommodated.

114. Again, his financial circumstances are the consequence of the injustice done to him. Had he been settled on discharge, he would most likely have found profitable employment. Moreover, his son would have been entitled to accompany him.

115. The provisions of s.117B(4) and (5) do not apply.

116. I have also had regard to the fact that the sponsor was separated from his family when serving the Crown. Moreover, he served well in excess of the four year minimum required to obtain settlement. His wife sacrificed her family life and his son grew up without a father for the first few years of his life. I find that there are no countervailing considerations from the respondent's side.

117. Having regard to the circumstances as a whole, I find the contemplated interference is disproportionate. That is particularly so having regard to the historic injustice prevalent in this case.

Notice of Decisions

The decision of the First-tier Tribunal involved the making of errors of law and is set aside.

Having set it aside, I re-make the decision allowing the appellants' appeals.

No anonymity direction is made.

Signed Date 16 December 2015

Deputy Upper Tribunal Judge Mailer