Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **HU 03057 2015**

THE IMMIGRATION ACTS

At **Field House**	Decisions and Reasons Promulgated
on **20.11.2017**	On 23 November 2017

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Sima PUN
(Anonymity Direction Not Made)

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Samuel Shepherd* (counsel instructed by NC Brothers, Reading)
For the respondent: Mr Tom Wilding

DECISION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Christine Graham), sitting at Birmingham on 14 November 2016, to dismiss Gurkha dependant appeal by a citizen of Nepal, born in 1988. The appellant's father had served with the Brigade of Gurkhas from 1967 – 71, of course long before there had been any thought of that being rewarded with indefinite leave to remain in this country. However, after this had come about, he and his wife had settled here in 2011, leaving the appellant and a married elder brother behind them.

2. The appellant had applied for leave to join them not long after, but her appeal against refusal of that application had been dismissed in 2012: neither side was able to provide me with a copy of that decision. She had

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

applied again on 16 June 2015, but was once more refused on 20 July that year.

3. The judge set out in her paragraph 2 the terms of the Home Office Gurkha dependant policy, to be found in annex K of the Immigration Directorates' Instructions [IDIs], providing for the settlement in some circumstances of adult children of former Gurkhas. The appellant unarguably satisfied the conditions for the policy to apply, with the exception of two important ones, which required (5) that the applicant be financially and emotionally dependent on the former Gurkha, and that (9)

> The applicant has not been living apart from the former Gurkha for more than two years on the date of application, and has never lived apart from the sponsor for more than two years at a time, unless this was by reason of education or something similar (such that the family unit was maintained, albeit the applicant lived away).

4. This appellant clearly had been living apart from her father for over two years when she made this application, which had not been for the purpose of study or anything similar, but because her parents decided to move here without her in 2011. She would not have fallen within the terms of the Gurkha dependant policy as it then stood, though of course that was the background against which they decided to do so.

5. The judge reviewed the evidence, and the relevant authorities, including *Ghising* (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC) (approved in *Gurung & others* [2013] EWCA Civ 8), and *Kugathas* [2003] EWCA Civ 31. She concluded as follows at paragraph 18:

> … I am satisfied that there was no family life between the Appellant and her parents. I have found it relevant that the Appellant was left as a minor to live alone in Nepal, at the time the parents left she had not landline and therefore she was unable to speak to her parents for a '*few years*'. There is no evidence that the sponsor was financially supporting his daughter from the time he left her in Nepal. The Appellant's representative has accepted that the Appellant was, at least for a period of time, employed by a gym in Nepal and in the absence of evidence of money transferred to the Appellant until (one transfer in 2015) 2016, I am left to find that she supported herself in Nepal. Therefore I find that Article 8 (1) is not engaged in this appeal.

6. The appellant was given permission to appeal in the Upper Tribunal on various grounds, including a reference to *Jitendra Rai* [2017] EWCA Civ 320. At paragraph 39 Lindblom LJ, giving the leading judgment, put the question at issue in this way:

> … whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did

7. The issue is exactly the same in the present case, and Mr Wilding conceded that, if the judge had been wrong to make the finding she did on family life, then the appeal must be allowed. The result in *Rai* was that, since the deputy Upper Tribunal judge had not properly applied the

principles in the authorities to the question of whether the appellant enjoyed a family life with his parents (see paragraphs 36 – 37), and had allowed himself to become distracted from that main question by repeated reference to the parents' decision to leave him and come here (38 – 39), a re-hearing was ordered.

8. I can now turn to the argument before me. Mr Shepherd put his case with commendable economy and realism. Dealing first with the judge's mistake about the appellant having been a minor when her parents came here (see passage cited at **5**), he suggested that, if her parents had nevertheless decided to leave her behind at that age, the separation between them would have been all the more significant. However I put it to him that the first sentence of this passage, read as a whole, looked very much more as if the judge was not making that point at all, but making allowances, in view of what he thought had been her age, for the appellant's failure to communicate with her parents for some considerable time. Mr Shepherd conceded that this was a tenable view, and I see no reason not to adopt it.

9. Mr Shepherd went on to refer to the change in the policy for the admission of adult Gurkha dependants, introduced by annex K in 2015: the appellant had unquestionably lived together with her parents as a family until they left Nepal in 2011, and, if she had been able to make her application by 2013, then she would not have been apart from them for as much as two years. I shall come back to this point after dealing with the arguments on both sides.

10. Mr Shepherd's last point was to suggest that the judge had not given the appellant credit for satisfying the remaining requirements of annex K. However, it was abundantly clear to all concerned that, going through those requirements in order, her father was a former Gurkha settled here; she was his daughter, outside the UK, and between 18 and 30. There had never been any suggestion by the respondent that her father would not have applied for settlement before 2009 if he had been able to do so. It follows that the judge cannot be criticized for concentrating on the real points in issue, which were whether the appellant was financially and emotionally dependent on her father, and what the reasons were for her living apart from him for over two years.

11. The first of these questions is at the heart of the point on which the judge dismissed the appeal, which was to conclude that there was no family life between the appellant and her parents as defined in the authorities, for the purposes of article 8 (1) of the European Human Rights Convention, so that she did not need to go on to consider whether or not the appellant's exclusion would be proportionate to the legitimate purpose of immigration control, in terms of article 8 (2).

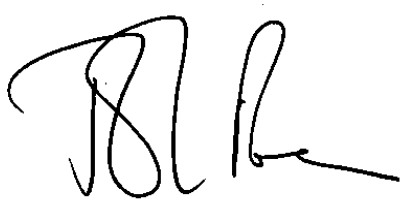
12. As Mr Wilding pointed out, Mr Shepherd's argument at **8** had to do, not with the question of whether family life between the appellant and her parents existed or not, but with whether, if family life were found to exist, the history of their separation would make her exclusion disproportionate.

CONCLUSIONS

13. I agree with Mr Wilding's argument. The question on which the judge decided the appeal was the existence of family life between the appellant and her parents: she referred to the leading authorities, and made findings of fact at paragraph 18, which Mr Shepherd realistically accepted could not be challenged on the evidence before her.

14. While the lack of any provision for settlement of former Gurkhas before 1997 is described in the authorities as a 'historical injustice', I am not aware of any which apply that term to the effect of the policy in force from 2009 to 2015. It has become more favourable since then; but, although the appellant's parents cannot be blamed for taking up their rights in 2011, the judge had to decide the case on the facts before her in November 2016. She provided a fully-reasoned basis for her conclusions, and in my view they cannot be challenged.

Appeal dismissed



(a judge of the Upper Tribunal)

Dated 22 November 2017