Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08538/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd July 2017	**On 11th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR KHAGENDRA RAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER NEW DELHI

Respondent

Representation:

For the Appellant: Mr A Jafar, instructed by GIL Solicitors
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Nepal, appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer dated 16th September 2015 to refuse his application for entry clearance to settle in the UK as the adult dependent son of his mother who is the widow of an ex-Ghurkha soldier

(the appellant's father). First-tier Tribunal Judge P J Holmes dismissed the appeal in a decision dated 30th June 2016. The Appellant's application for permission to appeal against that decision was refused by First-tier Tribunal Judge Hodgkinson on 1st November 2016.

2. A renewed application for permission to appeal was granted by the Upper Tribunal on 4th May 2017 on the basis that the grounds raise arguable issues including that the key finding that the Appellant would not have settled in the UK when a child appears to go unexplained. The Upper Tribunal Judge also suggested that in light of the decision by the Court of Appeal in **Jitendra Rai v ECO [2017] EWCA Civ 320** it may be that the judge was wrong to place weight upon the fact that the Appellant's mother chose to move to the UK. The Upper Tribunal Judge also pointed out that it may be that the Appellant faces formidable obstacles to making out his case in light of the apparently sound finding that the Appellant and his mother could not satisfactorily maintain and accommodate themselves without resort to public funds.

The background

3. The Appellant's father was a Ghurkha who was discharged before 1997. The Appellant was born on 12 June 1995. The Appellant's father died in 2002. As his widow, the Appellant's mother became entitled to settle in the UK in 2009. The Appellant, as an adult child, became entitled to apply for settlement in January 2015. She and the Appellant applied for entry clearance in August 2015. The Appellant's mother's application was granted and she entered the UK. The Appellant's application was refused.

4. The appeal was determined without a hearing. In his decision the First-tier Tribunal Judge considered the documentary evidence taking into account that the Appellant is single and unemployed and that he and his mother were living together in Nepal and that they made an application for entry clearance together and he found that there is family life between the Appellant and his mother. The judge went on to consider proportionality, taking into account the historical injustice identified in the case law including **Gurung & Others [2013] EWCA Civ 8**. The judge found that the decision to refuse entry clearance is proportionate to the Respondent's legitimate aim.

Submissions

5. At the hearing before me Mr Jafar expanded on the grounds and his skeleton argument. Mr Jafar submitted that the judge's finding at paragraph 16 of the decision that there is family life between the Appellant and his mother was not challenged and is not in dispute. He pointed out that it was also not in dispute that noted that the Appellant's father was a Ghurkha who was discharged before 1997 and died in 2002 and that his wife (the Appellant's mother) became eligible to enter the UK in 2009. The Appellant himself only became eligible to apply to enter the UK in January 2015 under Annex K of the Immigration Rules. He relied on

the decision in **Rai** and submitted that the judge erred in taking into account the fact that the Appellant's mother voluntarily left Nepal in his assessment of proportionality. He submitted that this was similar to the reasoning criticised by the Court of Appeal in **Rai**.

6. Mr Jafar submitted that the real nub of this case is the judge's consideration of the issue of the historic injustice in the proportionality assessment. He submitted that the real issue is whether the Appellant's father would have settled in the UK had he had the opportunity to do so. He referred to the covering letter submitted by the Appellant along with his application and referred to by the judge at the end of paragraph 19 of the decision. He submitted that this letter was sufficient to show an intention on the part of the Appellant's father to settle in the UK. He submitted that it should be taken into account that the Appellant's father died in 2002 but that, although he would have acquired the right to settle in the UK in 1972 upon his discharge from the army, that opportunity was not offered to him before his death in 2002 and indeed it was not offered to him or his wife until 2009. He submitted that the passage of time should be taken into account in looking at the intentions expressed by the Appellant's father. He submitted that the assertion made by the Appellant as to his father's wishes has not been challenged by the Respondent and that that was a sufficient reason to accept it as highlighted by the Tribunal in at paragraph 5 of the decision in **Ghising and Others (Ghurkhas/BOCs: historic wrong: weight) [2013] UKUT 567 (IAC)**. He submitted that in light of the death of the Appellant's father in 2002 and the passage of time as a result of the delay on the part of the Home Office in acknowledging the rights of the Ghurkhas that the Appellant's father could not have expressed his intentions as fully as if he had been alive when the right had been given to him.

7. Mr Jafar pointed out that the Appellant was born in 1985, he turned 18 in 2003 after the death of his father. In terms of the other aspects of the proportionality assessment Mr Jafar submitted that there are no adverse factors weighing against the Appellant, his mother has a good immigration history and she has been employed since coming to the UK and there is an expectation that the Appellant himself will be employed too. Mr Jafar referred to the last paragraph of the grant of permission to appeal by the Upper Tribunal and submitted that the lack of financial independence is not a necessary requirement under Article 8 or the policy which was updated in January 2015**.** He submitted that the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002 should be considered in the round and that if the evidence were properly assessed the balance falls in favour of the Appellant.

8. In his submissions Mr Kandola accepted that the judge found at paragraph 16 that there was family life between the Appellant and his mother. As the Rules were not being considered the judge looked at the steps under **R v SSHD ex parte Razgar [2004] UKHL 27**. He accepted that the real nub of this appeal is whether the historic injustice is engaged by any evidence before the First-tier Tribunal Judge of an intention on the part of

the Appellant's father to settle in the UK when he was alive with his dependent child who is now an adult. He relied on paragraphs 41 and 42 of the decision in **Rai** and highlighted that the burden is on the Appellant to establish that there had been an intention to settle in the UK.

9. Mr Kandola submitted that in this case the judge did look at the evidence before him and this is referred to at the last sentence of paragraph 19 so this is not a case where the judge has failed to have regard to material evidence. He submitted that the only evidence before the judge as to the Appellant's father's intentions was the Appellant's covering letter and that this did not include an explicit reference to an intention to settle, it just referred to an intention to visit the UK. In those circumstances Mr Kandola submitted that it was open to the judge to come to the conclusion he did. He submitted that, as the evidence was so limited, there was no error of law.

10. Mr Kandola accepted that, if the historic injustice issue is engaged in this case, there needs to be more than a concern in relation to maintenance and accommodation to outweigh the historic injustice. He accepted that there was no criminal history. He noted that there was no evidence in relation to the Appellant's ability to speak English but accepted that, even combining these factors, there is not enough to outweigh the historic injustice.

11. In his reply Mr Jafar reiterated his submission that the consequences of delay in this case meant that, not only had the Appellant's father not been offered the opportunity to settle in the UK, but he also had not had the opportunity to express a choice in relation to whether he would settle as it had never been offered to him. In his submission, in the circumstances the choice made by the Appellant's mother, as soon as she had the opportunity to do so, is evidence of the father's intentions. Mr Jafar submitted that the judge here placed too high a threshold on the evidence establishing that point in the circumstances of this case.

Findings

12. As identified by the parties, the key issue here is the treatment of the historic injustice issue. The judge dealt with this issue at paragraph 19 where he said:

> "A further consideration with relevance to proportionality, which I take into account, is the historical injustice that the Court acknowledged in **Gurung and Others [2013] EWCA Civ 8**. At paragraph 38 the court observed 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". At paragraph 42 the court held that "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". However, I am not satisfied that any such facts have been shown in the present appeal, even taking into account what is said in the covering letter that the appellant claims to have accompanied his application."

13. It is clear from paragraphs 5 and 19 that the judge considered the Appellant's covering letter (contained in a small unpaginated bundle) in looking at the Appellant's father's intentions to settle in the UK. The letter is dated 21st August 2015 and appears to have accompanied the application form and all of the other evidence submitted along with the application. This letter is the only evidence as to the Appellant's father's intentions and contains the following:

> "Moreover, my father served UK with his full responsibility and got retired and married with my mother. As per my mother he used to recite the stories of Ghurkha bravery and dreamland for Ghurkha UK. He wished that one day he would visit the nation whom he served with my mother. With different reasons, he could not do on his lifetime. Later on, the British government allows the family of ex-British Army to settle in the UK and it would be a great moment for a family if my father was alive, unfortunately it wouldn't happen. Now, my mother is 60 years and I wanted to be with her in the UK the very land my father used to tell my mother. I want my mother to see UK and enjoy her good time in the UK. So, to support her, care her and remain with her is my primary motive to apply for settlement visa with my mother."

14. The issue really is whether this is sufficient evidence that the Appellant's father would have settled in the UK but for the historic injustice. At paragraph 19 the judge concluded that this letter is not sufficient to demonstrate that the Appellant met the test set out in **Gurung**. However, the difficulty here is that the judge rejects the contents of that letter in one sentence. The judge has failed to give any reasons for rejecting the assertions in that letter and for concluding that they do not demonstrate an intention on the part of the Appellant's father to settle in the UK had he been given the opportunity to do so. In my view, given that this issue is central to the assessment of the historical injustice, the conclusion that the test has not been met is inadequately reasoned. In light of the centrality of the Appellant's father's intentions to the determination of the weight to be given to the historic injustice I find that the failure to give reasons for the conclusion in relation to this issue amounts to a material error of law.

15. In these circumstances I set aside the decision of the First-tier Tribunal Judge. There was no challenge to the findings of fact made by the judge and those findings are preserved.

Re-Making the Decision

16. Mr Jafar indicated that there was no further evidence and he was happy to rely on the evidence already submitted and submissions in terms of remaking the decision.

17. The First-tier Tribunal Judge's finding that there is family life between the Appellant and his mother has not been challenged. There is no challenge to the Judge's conclusion that the first four stages of the **Razgar** steps have been answered in the affirmative. There is no dispute that, as this is an application for entry clearance by the son of a former Ghurkha, the historic injustice is a factor to be given weight in the assessment of proportionality.

18. I have considered the witness statement from the Appellant dated 15th June 2017 and note that, although there appears to be an assumption that the Appellant's father would have applied to settle in the UK had that right been given to him before his death, the Appellant's statements contain no assertion that his father expressly voiced that intention before his death. The Appellant's mother's statement also appears to imply that her husband would have sought to settle in the UK but again contains no express report of his intention to that effect. Therefore the only reference to anything the Appellant's father said about this issue is that contained in the Appellant's covering letter of 21st August 2015.

19. I take into account the passage of time and the fact that before his death in 2002 the Appellant's father had not been given any right to settle in the UK nor had any of his Ghurkha colleagues. He may not therefore have been able to express his desires or intentions in terms of settlement. I take into account that it is clear from the letter that English is not the Appellant's first language and there is therefore the possibility that the expressions of intention are not entirely accurate. I note that, although the Appellant refers to his father wishing that he would one day visit the UK, he also says that when the British Government allowed the family of a Ghurkha to settle in the UK "it would be a great moment for our family if my father was alive". I have considered the entire letter in the context of the subsequent statements. I take into account the fact that the Appellant's mother came to the UK to settle as soon as she was able to do so as being a strong indication of the intentions of the Appellant's father.

20. In these circumstances I accept on balance that the evidence establishes that, but for the historic injustice, the Appellant's father would have settled in the UK prior to his death in 2002. At his death in 2002 the Appellant would have been under 18 and would therefore have been able to accompany his father as a dependent child.

21. In **Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)** the Tribunal gave the following guidance as to the weight to be attached to the historic wrong in the proportionality assessment:

> "59. That said, we accept Mr Jacobs' submission that where Article 8 is held to be engaged and the fact that but for the historic wrong the Appellant would have been settled in the UK long ago is established, this will ordinarily determine the outcome of the proportionality assessment; and determine it in an Appellant's favour. The explanation for this is to be found, not in any concept of new or additional "burdens" but, rather, in the *weight* to be afforded to the historic wrong/settlement issue in a proportionality balancing exercise. That, we consider, is the proper interpretation of what the Court of Appeal were saying when they referred to the historic injustice as being such an important factor to be taken into account in the balancing exercise. What was crucial, the Court said, was the consequence of the historic injustice, which was that Gurkhas and BOCs:
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> > "were prevented from settling in the U.K. That 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 is settled in the UK has such a strong claim to have his article 8(1) right vindicated, notwithstanding the potency of the countervailing public interest in maintaining of a firm immigration policy". [41]
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> 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.
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> 60. Once this point is grasped, it can immediately be appreciated that there may be cases where Appellants in Gurkha cases will not succeed, even though their family life engages Article 8(1) and the evidence shows they would have come to the United Kingdom with their father, but for the injustice that prevented the latter from settling here on completion of his military service. If the Respondent can point to matters over and above the "public interest in maintaining of a firm immigration policy", which argue in favour of removal or the refusal of leave to enter, these must be given appropriate weight in the balance in the Respondent's favour. Thus, a bad immigration history and/or criminal behaviour *may* still be sufficient to outweigh the powerful factors bearing on the Appellant's side. Being an adult child of a UK settled Gurkha ex-serviceman is, therefore, not a "trump card", in the sense that not every application by such a person will inevitably succeed. But, if the Respondent is relying only upon the public interest described by the Court of Appeal at paragraph 41 of Gurung, then the weight to be given to the historic injustice will normally require a decision in the Appellant's favour. "

22. Mr Kandola properly accepted that there are no factors over and above the public interest in maintaining a firm immigration policy in this case. He accepted that, although it is not clear whether the Appellant speaks English and there is a question in relation to the financial independence, even cumulatively these issues would not outweigh the weight to be given to historic injustice in this case.

23. In the circumstances and in light of my findings above I attach significant weight to the historic injustice in this case and I find that the decision to

refuse entry clearance in this case is not proportionate to the Respondent's legitimate aim.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside.

I remake the decision by allowing it on human rights grounds.

No anonymity direction is made.

Signed Date: 7th July 2017

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable because the evidence relied on to remake the decision was before the ECO.

Signed Date: 7th July 2017

Deputy Upper Tribunal Judge Grimes