Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09385/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 October 2017	**On 18 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

ENTRY CLEARANCE OFFICER (NEW DELHI)

Appellant

and

B R
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Respondent: Mr E Wilford, Counsel
For the Appellant: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. For the sake of convenience, I refer to the parties as they were in the First-tier Tribunal, namely with the Entry Clearance Officer as the respondent.

2. The appellant is a citizen of Nepal who appealed against the respondent's decision to refuse her entry clearance as the adult dependent of the widow of a retired Gurkha soldier. The appeal against that decision was allowed by Judge of the First-tier Tribunal Robison ("the FTTJ") in a decision promulgated on 19 January 2017.

3. No anonymity direction was made in the First-tier Tribunal but given my references to the appellant's and her mother's personal circumstances

they are entitled to anonymity in these proceedings. I make a direction accordingly.

4. Permission to appeal was granted by Upper Tribunal Judge Martin in the First-tier Tribunal on 27 July 2017 in the following terms:

> "In an otherwise thorough and detailed Decision and Reasons it is arguable that the Judge fell into error in finding that there was dependency between the 29 year old Appellant and her mother on the basis of financial support and regular telephone calls when the mother had chosen to leave her daughter in Nepal in 2015.
>
> It is also arguable that the Judge misapplied the "historic wrong" principles."

Hence the matter came before me.

Submissions

5. For the respondent, Ms Pal adopted the grounds of appeal to this tribunal. It was not clear how the FTTJ had found family life between the adult appellant and her mother on the evidence. The tribunal made no finding on the undisputed fact that the appellant's mother had left the appellant in Nepal to live in the UK with no immediate prospect of the appellant being able to join her. The evidence of historic injustice suffered by the appellant's father was only produced at the hearing; historic injustice was only one of several factors to be considered in the proportionality assessment. If the late father's application had been made as soon as legally possible, the appellant would still have been an adult, being aged 21. No application was made by the father. The application by the appellant and her mother was not made as soon as it could have been and it was not clear why not. The proportionality assessment was not based on a balanced assessment of all relevant factors. The respondent did not challenge the finding of the FTTJ as regards local cultural traditions in Nepal at [43]. The respondent's position was that if there had been family life, the mother would have given up her right to enter the UK in order to stay with her daughter.

6. For the appellant, Mr Wilford adopted his speaking note. It had been conceded before the FTTJ that the appellant could not meet the Immigration Rules for entry clearance as an adult dependent relative. There was no challenge to the FTTJ's decision that the respondent's policy did not apply to the appellant because the sponsor was the appellant's mother, rather than the former Gurkha soldier. Mr Wilford submitted that the appellant's mother's decision to enter the UK leaving the appellant in Nepal could not be taken to demonstrate a lack of family life (Rai v ECO, New Delhi [2017] EWCA Civ 320). The right for the appellant to come to the UK did not arise until January 2015. The respondent had inaccurately characterised the basis for the FTTJ's finding of family life. The FTTJ had not misapplied the historical wrong principles in Ghising & Ors

(Gurkhas/BOCs – historic wrong – weight) [2013] UKUT 567 (IAC). If the appellant's mother had not taken up her right to settle in the UK, she would have lost it. He submitted there was no error of law in the decision.

Discussion

7. As regards the assessment of whether or not there was family life between the appellant and her mother, the FTTJ took into account they had lived together until the mother was granted entry clearance. Ms Pal conceded before me that the mother would have lost her right to settle in the UK (on that occasion at least) if she had not settled in the UK pursuant to the grant of leave to enter. The suggestion in the grounds to this tribunal that the mother chose to leave the appellant in Nepal to emigrate to the UK is undermined by this concession. My attention has also been drawn to paragraphs 38 and 39 of Rai which makes it clear that concentrating on that appellant's parents' decision to leave Nepal and settle in the UK, without focusing on the practical and financial realities entailed in that decision was "a mistaken approach". The FTTJ focused instead, and rightly, on the nature and quality of the appellant's life with her mother at the time of the latter's departure to settle in the UK and whether it had endured beyond it, as advocated at paragraph 39 of Rai.

8. The FTTJ found [43] that in Nepalese culture a daughter remains part of the family until she is married, a finding which is not challenged by the respondent before me. The FTTJ also took into account that the appellant had not established another family nor was she living an independent life [43]. She had found earlier at [41] that the appellant was wholly dependent on her mother for financial support. Finally, the FTTJ considered the extent to which family ties had been maintained after the mother's departure for the UK and found that they had: there was full financial dependence and documentary evidence of "very regular telephone calls from the appellant to the UK": the FTTJ accepted the appellant's evidence that she had continuous and frequent contact with her mother over the years since their separation. The FTTJ's finding that family life existed, both before and after the appellant's mother's departure from Nepal, was, therefore, carefully reasoned and based on the evidence. In the circumstances, and given the low threshold for engagement (AG (Eritrea v SSHD [2007] EWCA Civ 801), the FTTJ was entitled to find that Article 8 was engaged.

9. Insofar as the proportionality assessment is concerned, the respondent submits there was no evidence of historic injustice until the hearing. The grounds of appeal to the First-tier Tribunal refer to this issue and give reasons why the appellant's late father could not make a settlement application under the 2009 discretionary arrangements and why no applications were made by the appellant and her mother until later. Whilst this was not evidence, the respondent was on notice of the issue. He could have expected the appellant and sponsor to give evidence on the issue at

the hearing. The Entry Clearance Manager did not address the historic injustice issue in his review of the decision. It is not clear what point is being made by the respondent with regard in this submission but, for the avoidance of doubt, I am satisfied there is no procedural irregularity such as to amount to an error of law. The appellant was entitled to adduce evidence on the issue at the hearing.

10. The appellant and her mother gave oral evidence that it had been the intention of the appellant's father to settle in the UK but that he had been prevented from so doing by illness. The FTTJ accepted that evidence [45] as she was entitled to do. Having accepted that "the family would have settled in the UK but for the historic injustice, and therefore that the family would have been living in the UK long before now", the FTTJ then summarised the guidance in Ghising & Ors to the effect that "where it is found that Article 8 is engaged, and but for the historic wrong, the Appellant would have been settled in the UK long ago, this will ordinarily determine the outcome of the Article 8 proportionality assessment in the appellant's favour, where the matters relied upon by the Secretary of Sate/ECO consist solely of the public interest in maintaining a firm immigration policy". There was no suggestion that the ECO relied on any other facet of the public interest in the appeal before the FTTJ (such as a poor immigration history or criminal record).

11. It is not submitted specifically by the respondent that the appellant's father's illness was a causative factor in his having failed to make a timely application to settle, only that

> "the historic injustice argument is simply one of several factors that should have been considered in the proportionality assessment. If the late father's application had been made as soon as legally possible the appellant would still have been an adult, being aged 21. However, an application was not made by the late father. The application by the sponsor and appellant was also not made as soon as it could have been and it is unclear exactly why the applications were made at the time that they were."

However, the FTTJ accepted the evidence of the appellant that the appellant's father was too ill to make the application and the appellant's and her mother's circumstances prevented applications being made after his death [45]. Thus applications were made as soon as practically possible. This finding is sustainable on the evidence.

12. In any event, in AP (India) v SSHD [2015] EWCA Civ 89 it was held that, when considering whether the historic injustice was the cause of an appellant's inability to gain entry sooner, "the courts should not in this context be unduly rigorous in the application of the causation test, given that its significance is to redress this historic injustice". The evidence before the FTTJ was sufficient to demonstrate that, but for the historic injustice, the appellant's father would have applied to settle in the UK. By analogy, as was said by the Court of Appeal in AP (India), if the sponsor in

that case had given express evidence to the effect that he would have come to the UK earlier if he had been entitled to do so then it would have been enough to demonstrate that the causal link had been established. The appellant's mother gave such evidence at the hearing before the FTTJ. She was entitled to rely on it to find there was a historic injustice and that this rendered disproportionate the degree of interference with the appellant's protected rights.

13. Contrary to the respondent's grounds of appeal, the FTTJ's proportionality assessment is based on a balanced assessment of all the relevant factors and that the conclusion reached is sustainable on the evidence before her.

14. For these reasons, there is no error of law in the FTTJ's decision and reasons.

Decision

15. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

16. I do not set aside the decision.

Signed ***A M Black*** Date 18 October 2017

Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed ***A M Black*** Date 18 October 2017

Deputy Upper Tribunal Judge A M Black