Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10072/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 October 2017	**On 07 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

POONAM RAI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Nath, Home Office Presenting Officer
For the Respondent: Mr E Wilford of Counsel, instructed by Everest Law Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Froom promulgated on 12 July 2017.

2. Although before me the Entry Clearance Officer in New Delhi is the appellant and Ms Rai is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Entry Clearance Officer as the Respondent and Ms Rai as the Appellant.

3. The Appellant is a national of Nepal born on 25 February 1989. Her personal circumstances and the history of her application are summarised at paragraph 1 of the Decision of the First-tier Tribunal. She is the daughter of Mr Tej Bahadur Rai (born on 20 March 1959), who is a former member of the Brigade of Gurkhas, having seen service between 14 January 1980 and 31 March 1994 in Hong Kong, Australia, Singapore, the UK, Belize, and Brunei. He reached the rank of Corporal and was discharged with military conduct being described as "*exemplary*". The Appellant's father and mother were both granted settlement visas and arrived in the UK in 2010. Mr Rai was issued with entry clearance in January 2010 and arrived in May 2010. His partner, the Appellant's mother, was issued with entry clearance in May 2010 and arrived in May 2011. The Appellant's siblings, Prakash Rai (d.o.b. 26 June 1994), and Laxmi Rai (d.o.b. 9 August 1992), were also granted entry clearance at the same time as their mother, but entered the UK shortly before their mother on 24 August 2010 to join their father.

4. The Appellant made an application for entry clearance as the dependent daughter of a former Gurkha soldier. The application was refused for reasons set out in a Notice of Immigration Decision dated 22 March 2016. The Notice of Immigration Decision is a matter of record and its contents are summarised in the Decision of the First-tier Tribunal Judge at paragraphs 3-4. In such circumstances I do not propose to rehearse again the bases of the Respondent's decision.

5. The Appellant appealed to the IAC on human rights grounds. The appeal was allowed for the reasons set out in the Decision of Judge Froom.

6. The Respondent sought permission to appeal, which was granted on 26 July 2017 by First-tier Tribunal Judge Boyes.

7. Although the Appellant did not file a Rule 24 response within the appropriate timeframe, Mr Wilford has provided for the assistance of the Tribunal a written document titled 'Appellant's Speaking Note' - which Mr Nath was able to peruse prior to making his submissions in the appeal.

8. In his submissions Mr Nath essentially placed reliance upon the Grounds of Appeal as drafted, and save for directing my attention to the relevant paragraphs in the First-tier Tribunal Judge's decision referenced in some of the paragraphs of the Grounds, did not seek to expand or otherwise amplify upon the Grounds as pleaded. In all of the circumstances I did not find it necessary to invite Mr Wilford to expand further upon his so-called Speaking Note.

9. In my judgement the First-tier Tribunal decision carefully and thoroughly examines the facts of the particular case, setting them out within a framework of self-directions that draws adequately and appropriately from the applicable case law and principles in respect of Article 8, in respect of family life between parents and dependent children, and most particularly

in respect of the circumstances of adult children of Gurkha veterans. I do not wish merely to repeat by lengthy recitation from what is in substance an exemplary decision of the First-tier Tribunal, and so seek to focus only on the specific aspects of the Respondent's challenge.

10. The Respondent over eight paragraphs of Grounds essentially raises three lines of argument to seek to impugn the decision of Judge Froom.

11. The first argument is in relation to the issue of the dependency between the Appellant and her parents and the question of whether family life existed in circumstances where the Appellant was an adult by the date of the Respondent's decision (and indeed had been an adult for some time). The Grounds rehearse some of the applicable principles by reference to the cases of **Kugathas [2003] EWCA Civ 31** and **AAO [2011] EWCA Civ 840**, but essentially alight upon Judge's phrase "*unmarried female child*" at paragraph 27 of the Decision. It is submitted that the Judge had thereby conflated the concept of being unmarried with being dependent on others, and it is argued that this is an erroneous conflation.

12. In my judgement the premise of the Respondent's challenge substantially fails to acknowledge the detailed, careful and nuanced analysis and findings of the First-tier Tribunal Judge with regard to family life. Such analysis, as I have indicated above, is manifestly guided by the case law cited and quoted from, and the evidence noted and recited in the Decision. Paragraph 27 is not confined merely to the fact that the Appellant is unmarried. The Judge says this:-

> "*In my judgment, the evidence shows that the appellant would be living with her parents and siblings but for the fact her father was unable to bring her at the same time. She is an unmarried female child and would be unlikely to leave her parents' home until she marries. I accept the reason given for the sponsor's decision to leave her behind in order to secure his own settlement status in the UK and I also accept this should not be taken to imply the Appellant was living an independent life. The intervening years have not broken the close family ties which exist and I accept there is continuing real and effective support. I accept the Appellant is financially dependent on the sponsor and that she continues to look to her parents for emotional support and guidance. This is in accordance with Nepalese cultural traditions. The family ties go beyond the normal ties of love and affection between adult children and their parents. It follows that article 8 is engaged in its family life aspect. The decision maintains the position whereby family life cannot realistically be enjoyed and therefore amounts to an interference of sufficient gravity.*"

13. The summation therein of the foregoing rehearsal of case law and evidence seems to me to go well beyond the suggested simple conflation of the concepts of 'unmarried' and 'dependent'. The finding of dependency, and the finding that ties go beyond the normal, is based on

substantially more than being unmarried. In the circumstances I find nothing of substance in this aspect of the Respondent's challenge.

14. The second line of challenge is set out at paragraph 5 of the Respondent's Grounds. The Respondent criticises the Judge for according significant weight to the so-called 'historical injustice' of Gurkha settlement policy, and also characterises the Judge's finding that the Appellant would have been settled in the UK with her family by now but for the historic injustice as "*pure speculation*".

15. With all due respect to the drafter of the Grounds, it seems to me that they run contrary to the relevant case law, and also indeed run contrary to the Respondent's own policy.

16. The Judge recorded in his Decision the evidence of the Appellant's father to the effect that he would have settled in the UK had that been an available option at or shortly after his discharge from the army. It is to be noted that the Respondent's relevant policy - which is incorporated in the Appellant's bundle before the First-tier Tribunal - says the following in respect of this issue at paragraph 17:

> "*In order to qualify for settlement under this policy the Home Office needs to be satisfied that the former Gurkha would have applied to settle in the UK upon discharge with the dependent child if they had been born by then (but otherwise the child would have been born here). If a sponsor states that he intended to settle in the UK on discharge, then, in the absence of any countervailing evidence, this requirement will normally be considered to have been met.*"

In such circumstances the suggestion in the Grounds of Appeal that this was a matter of pure speculation is not reconcilable with either the evidence that was before First-tier Tribunal Judge Froom, or the Respondent's own policy.

17. Moreover, in respect of the weight to be accorded to the historic injustice, it seems that the Grounds are irreconcilable with the case law in this area, and in particular the guidance recited by First-tier Tribunal Judge Froom at paragraph 31 of his Decision from the decision in **Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC)**, and in particular the following from the head note at paragraph (4):

> "*Accordingly, 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 an Appellant's favour, where the matters relied on by the Secretary of State/ entry clearance officer consist solely of the public interest in maintaining a firm immigration policy.*"

18. It is clear that the case law has now established that a very considerable weight is indeed to be accorded to the notion of historic injustice. In those circumstances I reject this particular line of challenge as being essentially fundamentally misconceived.

19. The third line of challenge advanced on behalf of the Respondent by way of the Grounds relates to the First-tier Tribunal Judge's consideration of proportionality with reference to the fact that the Appellant could not satisfy the Immigration Rules, and also with regard to the public interest considerations pursuant to section 117A-D of the 2002 Act.

20. To a certain extent this line of challenge must be read down with the observations in respect of proportionality that I have just referred to in **Ghising**. In any event, it seems to me that in substance - contrary to the submission in the Grounds of Appeal - the First-tier Tribunal Judge did give consideration to the public interest considerations set out in section 117B: see in particular paragraphs 33 and 34 of the Decision. Indeed, Mr Nath very helpfully and realistically acknowledged that on the face of it the Judge had had regard to such matters in the course of reaching his decision in the appeal.

21. Accordingly, I also reject the third line of argument advanced by the Respondent.

Notice of Decision

22. I find no error of law in the decision of the First-tier Tribunal. Accordingly the decision of First-tier Tribunal Judge Froom stands: the Appellant's appeal remains allowed.

23. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: 5 November 2017

Deputy Upper Tribunal Judge I A Lewis