



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/03540/2015  
HU/03541/2015  
HU/03545/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30<sup>th</sup> January 2018**

**Decision & Reasons Promulgated  
On 05<sup>th</sup> April 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE LEVER**

**Between**

**MR RANJIT RAI  
MISS SUJATA RAI  
MISS ASHA RAI  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Rai of Counsel

For the Respondent: Mr Kotas

**DECISION AND REASONS**

**Introduction**

1. The Appellants born on 12<sup>th</sup> May 1995, 9<sup>th</sup> October 1992 and 17<sup>th</sup> July 1990 are citizens of Nepal. They are siblings and the adult children of Mrs Tara Rai and the late Mr Birbhakta Rai who was an ex-Gurkha soldier. The

Appellants were represented by Mr Rai of Counsel. The Respondent was represented by Mr Kotas a Presenting Officer.

### **Substantive Issues under Appeal**

2. The Appellants had made application for entry clearance to settle in the United Kingdom. Their applications have been refused by the Entry Clearance Officer on 30<sup>th</sup> October 2015. The Appellants had appealed that decision and their appeals were heard by Judge of the First-tier Tribunal Wylie on 5<sup>th</sup> April 2017. The judge had dismissed their appeals. Permission to appeal was made on behalf of the Appellants but refused by First-tier Tribunal Boyes on 11<sup>th</sup> October 2017. Permission was renewed and granted by Upper Tribunal Judge Storey on 23<sup>rd</sup> November 2017.

### **Submissions on Behalf of the Appellants**

3. Mr Rai submitted that irrespective of whether concessions have been made the judge should have decided this case under Annex K and he further referred me to the lead cases of **Gurung** and **Ghising** in respect of the historical injustice to Gurkhas. It was submitted that if family life and the historical injustice were put together then the judge's decision was wrong.

### **Submissions on Behalf of the Respondent**

4. It was submitted that Annex K was not relevant in this case. It was further said that the Gurkha soldier had been discharged in 1983, remained in Nepal until his death in 2007 and the Sponsor herself (the second wife) only came to the UK in 2015. It was submitted that the historical injustice lost its impact and that was part of the proportionality exercise.
5. At the conclusion I reserved my decision to consider the submissions and evidence. I now provide that decision with my reasons.

### **Decision and Reasons**

6. Permission to appeal was granted by Upper Tribunal Judge Storey on 23<sup>rd</sup> November 2017. Grounds were brief and stated "it is arguable that the judge erred in failing to consider the Appellant's Article 8 case with reference to the Annex K guidance".
7. Firstly it is worth setting out the background chronology of the family, as cases involving policy and Article 8 are necessarily fact-sensitive. Those facts are derived from paragraphs 1, 6 to 15 of the judge's decision. The Gurkha soldier Birbhakta Rai served in the British army from 1968 until 1983. That was a period of fifteen years. He had married his first wife in 1966. They had two daughters born in 1968 and 1973. Those daughters are now both married with families and living in Nepal. Following discharge from the army the former Gurkha soldier Mr Rai also lived in Nepal. He married his second wife (the Sponsor) in 1988. The Appellants are the children of that marriage born in 1990, 1992 and 1995. Mr Rai

died in September 2007. The Sponsor and the three Appellants remained in Nepal. In June 2015 the Sponsor and the three Appellants applied for entry to the UK. Only the Sponsor was successful and she came to the UK in August 2015.

8. The judge had noted at paragraph 18 that it was accepted that the Appellant could not succeed under the Immigration Rules. It was further accepted that as the Sponsor was the widow of a former Gurkha soldier the Respondent's guidance on settlement for dependence of ex-Gurkha soldiers did not apply. That is a reference to Annex K settlement for adult children of former Gurkha soldiers, as all Appellants are adult children.
9. Firstly it is clear from paragraph 18 that both Counsel on behalf of the Appellant and the Presenting Officer accepted that Annex K did not apply. The judge particularly in an adversarial system is entitled to take that joint concession as being the position of each party's case and therefore accept that he need not consider Annex K is applicable in this case. If however the judge believed that perhaps unusually both parties were wrong in law, then he was bound to have said so and invited evidence and submissions to deal with that issue. Alternatively had he only reached such a conclusion at the end of the hearing and when preparing his written decision, he was bound to notify both parties, and invite at the least written submissions in the form of skeleton arguments on the point or reconvene the hearing. The fact the judge did neither indicate that he both accepted and agreed with the parties' joint interpretation of the law that Annex K did not apply.
10. It is a little surprising that, that concession having been made by the Appellant's Counsel before the First-tier Tribunal, the Appellant's solicitor raises the failure of the judge to deal with it as being an error of law particularly and unfortunately without reference within the grounds of appeal to the concession having been made at the hearing. Such may have been overlooked by the judge granting permission.
11. However leaving those matters to one side it does seem clear that Annex K could not apply in the case where the ex-Gurkha soldier had died. The wording of Annex K does not envisage the application for adult children in circumstances where the Gurkha soldier is now deceased. Given the retroactive nature of the policy had it been thought to be applicable in cases where the Gurkha parent had died then Annex K would have been explicit upon that point. It seemed clear therefore that the Appellants cannot meet the specific requirements of Annex K 1, 5, 7, 8, 15, 17 and 19. It is the case therefore that Annex K did not apply in this case.
12. Annex K paragraphs 26 to 27 however notes that there is the requirement for an examination under Article 8 of the ECHR on the basis of exceptional circumstances and as part of that proportionality consideration account must be taken of the relevant case law:

**Gurung [2013] EWCA Civ 8.** The court found that the historical injustice faced by Gurkhas who were not able to settle in the UK until 2009 should be taken into account during the Article 8 consideration of the case but was not determinative. If a Gurkha can show that but for the historical 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 permit the adult child to join his family now.

**Ghising [2013] UKUT 00567.** 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.

13. The judge had at paragraph 18 onwards considered Article 8 of the ECHR. He found at paragraph 22 that the Appellants at the time of the application were all unmarried and lived in the family home, albeit the second Appellant was away as a student. There was a financial dependency upon the mother (Sponsor). The judge found family life existed between the Sponsor mother and the adult Appellants. Whilst every case is fact-sensitive that finding is consistent with the wider interpretation of family life between parents and adult children developed in **Patel v Mumbai ECO [2010] EWCA Civ 17**, **AA v The UK [2012] Imm AR 1**, **Gurung** and **Singh [2015] EWCA Civ 630**. Those cases were all referred to within the judgment of **Rai [2017] EWCA Civ 320** which was handed in on behalf of the Appellant. The judge was entitled therefore to find family life existing between the adult children Appellants and the Sponsor mother.
14. The next issue therefore the judge needed to determine was whether interference with that family life was proportionate and in this respect he needed to be aware of the approach taken by the courts in Gurkha cases found in those referred to above and indeed repeated at paragraph 27 of Annex K. That was an exercise undertaken by the judge at paragraphs 23 to 31. Each case is fact-sensitive even if there are superficial similarities. The judge in this case having in mind the Gurkha historical injustice cases noted above refer to the fact that there was no evidence the Gurkha soldier would have settled in the UK at an earlier date had he been able to do so. He noted the deceased Gurkha had been discharged from service five years before marriage to the Sponsor and that the Appellants would not have been dependent children of their father at his date of discharge. He also considered the family life enjoyed by the Appellants in Nepal with each other and the circumstances generally. The judge conducted the proportionality exercise under Article 8 as he was bound to so do. He clearly had in mind the historical injustice points referred to in **Ghising**. The striking features in this case perhaps unlike many such cases was the fact that the ex-Gurkha had died some years ago, there was no evidence of his intent to settle in the UK nor did it appear to be influential within the evidence generally and that at the point of discharge from the British army none of the Appellants were dependent children. Indeed none of them

had even been born. The judge was entitled on a proportionality test and properly applying the Gurkha historical injustice cases to have reached the decision that he did and it could not be said that that decision was either wrong in law or was an unreasonable decision.

**Notice of Decision**

There was no error of law made by the judge in this case. I uphold the decision of the First-tier Tribunal.

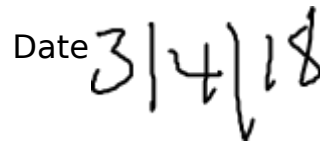
No anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Lever

Date



**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed



Deputy Upper Tribunal Judge Lever

Date

